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Supreme Court of the United States

October Term, 1969

No. ~~1713~~ 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT AND MOTION TO ADVANCE
AND FOR PENDENTE LITE RELIEF**

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CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

**MOTION TO ADVANCE AND FOR
PENDENTE LITE RELIEF**

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of national importance which require prompt resolution by this Court for the reasons stated in the annexed petition for a writ of certiorari. It would be desirable for the issues to be decided before the beginning of the next school term in September 1970 in order to guide the many courts and school boards now making plans for the coming year and to reduce somewhat the possible necessity for reorganizations of systems after the 1970-71 school term is underway.

Wherefore, petitioners pray that the Court:

1. Advance consideration of the petition for writ of certiorari and any cross-petition¹ or other response thereto

¹ On June 8, 1970, the Charlotte-Mecklenburg Board of Education voted in a public meeting to file a petition for certiorari seeking review of the decision below. We believe the board also desires expeditious consideration of its views.

during the current term, or if need be during the Court's vacation or such special or extended term as may be convenient;

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate, including either summary disposition without argument² or a special term for argument.³ If the Court decides to hear argument, it is suggested that the Court consider the case on the original record without printing or alternatively to permit reproduction of the appendix record used in the court of appeals by other than standard typographic means.

Petitioners also seek *pendente lite* relief pending disposition of the petition for certiorari comparable to that granted by the Court in *Carter v. West Feliciana Parish School Board*, 396 U.S. 226 (1969), and companion cases, namely, an order providing in substance that:

(1) The respondents shall take such preliminary steps as may be necessary to prepare for the complete and timely implementation of the district court's order of February 5, 1970, as amended by the district court, in the event this Court should uphold the district court order on the merits; and

² Comparable issues have been decided without the necessity for argument in such cases as *Bradley v. School Board*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); *Dowell v. Board of Education*, 396 U.S. 269 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Northcross v. Board of Education*, 397 U.S. 232 (1970).

³ In 1957 the Court extended its term to hear arguments during July. *Wilson v. Girard*, 354 U.S. 524 (1957). Special terms were convened to consider *Cooper v. Aaron*, 358 U.S. 1 (1958); *Rosenberg v. United States*, 346 U.S. 273 (1953); and *Ex parte Quirin*, 317 U.S. 1 (1942).

(2) The respondents shall take no steps which are inconsistent with or will tend to prejudice or delay full implementation of the February 5 order as amended at the beginning of the next school term.

Such an order is obviously necessary to avoid the possibility that the passage of time while the case is being reviewed here will unnecessarily prejudice the substantive rights of petitioners to attend a unitary system "at once". *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

Respectfully submitted,

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 26, 1970.

Opinions Below

The opinions of the courts below directly preceding this petition¹ are as follows:

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (Appendix hereto 1a).²

¹ Earlier proceedings in the same case are reported as *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D.N.C. 1965), affirmed 369 F.2d 29 (4th Cir. 1966).

² The appendix of opinions below is printed in a separate volume because it is voluminous.

2. Order dated June 3, 1969, unreported (40a).
3. Order adding parties, June 3, 1969, unreported (44a).
4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (46a).
5. Supplemental Findings of Fact, June 24, 1969, 300 F. Supp. 1386 (57a).
6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (58a).
7. Order dated August 29, 1969, unreported (72a).
8. Order dated October 10, 1969, unreported (75a).
9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (80a).
10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (82a).
11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (93a).
12. Order dated December 2, 1969, unreported (112a).
13. Order dated February 5, 1970, unreported (113a).
14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (134a).
15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (135a).
16. Supplementary Findings of Fact dated March 21, 1970, unreported (136a).
17. Supplemental Memorandum dated March 21, 1970, unreported (159a).
18. Order dated March 25, 1970, unreported (177a).

19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (181a).
20. The opinions of the Court of Appeals filed May 26, 1970, not yet reported, are as follows:
 - a. Opinion for the Court by Judge Butzner (184a).
 - b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (201a).
 - c. Opinion of Judge Bryan dissenting in part (215a).
 - d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (217a).
21. The judgment of the Court of Appeals appears at 226a.
22. The opinion of a three-judge district court in an ancillary proceeding in this case dated April 29, 1970, not yet reported, appears at 227a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970 (226a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the trial judge correctly decided he was required to formulate a remedy that would actually integrate each of the all-black schools in the northwest quadrant of Charlotte immediately, where he found that

government authorities had created black schools in black neighborhoods by promoting school segregation and housing segregation.

2. Whether, where a district court has made meticulous findings that a desegregation plan is practical, feasible and comparatively convenient, which are not found to be clearly erroneous, and the plan will concededly establish a unitary system, and no other acceptable plan has been formulated despite lengthy litigation, the Court of Appeals has discretion to set aside the plan on the general ground that it imposes an unreasonable burden on the school board.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. Introduction

Petitioners are here seeking review of an *en banc*³ decision of the United States Court of Appeals for the Fourth Circuit setting aside certain portions of an order of District Judge James B. McMillan of the Western District of North Carolina which had required the complete desegregation of the Charlotte-Mecklenburg County public school system. Three members of the court, in a plurality opinion written by Judge Butzner, agreed with the lower court that the school board had an affirmative duty to employ a variety

³ One judge did not participate. Prior to argument, Judge Craven entered an order disqualifying himself. He had sat and decided the case as a district judge when it first came to trial in 1965 (243 F. Supp. 667) and was of the opinion that this previous participation barred him from hearing the case as a circuit judge. 28 U.S.C. § 47.

of available methods, including busing, to disestablish its dual school system, but thought that the extent of busing required by the district court to desegregate the elementary schools was unreasonable (184a). Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate and would have affirmed (201a, 217a). Judge Bryan who would have reversed the entire order expressed disapproval of busing to achieve racial balance which he found the order to require for junior and senior high school students as well as elementary.

2. Proceedings Below

Black parents and students brought this action in 1965 to desegregate the consolidated school district of Charlotte City and Mecklenburg County, North Carolina pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The North Carolina Teachers Association, a black professional organization intervened seeking desegregation on behalf of the black teachers in the school system. This current phase⁴

⁴ The case was first tried in the summer of 1965. (243 F. Supp. 667 (1965)) The plaintiffs challenged an assignment plan where initial assignments were made pursuant to geographic zones from which students could transfer to schools of their choice. Plaintiffs complained that many of the zones were gerrymandered and that the zones of ten rural and concededly inferior black schools which the board claimed would be abandoned within a year or two overlapped white school zones. They also attacked the free transfer policy which had resulted in the transfer of every white child initially assigned to black schools as had the previous minority to majority transfer policy. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active, affirmative steps to integrate the schools. Also under attack was the board's policy looking to the "eventual" non-racial employment and assignment of teachers.

The district court approved the assignment plan but required "immediate" non-racial faculty practices.

The court of appeals affirmed. (369 F.2d 29 (1966)) The decision noted that the 10 black schools had in fact been closed. The court held, as it did the following year in *Bowman v. The School Board of Charles City County*, 382 F.2d 326 (1967), *rev'd sub nom. Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), that the school board had no affirmative duty to disestablish the dual system.

of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,⁵ again sought the desegregation of the schools.

District Judge James B. McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 1a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the next twelve months.⁶ He rejected the first plan submitted and called for another, found the second plan inadequate but accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.⁷ On December 1, 1969,

⁵ *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); and *Raney v. Board of Education*, 391 U.S. 443 (1968).

⁶ Judge McMillan has provided an excellent summary of the proceedings in the district court in his Supplemental Memorandum of March 21, 1970 (159a).

⁷ The first plan was rejected on June 20, 1969 (46a). The court found that the board had sought from the staff a "minimal" and inadequate plan, that the staff produced such a plan and the board thereupon eliminated its only effective provisions before submitting it to the court.

The second plan was found inadequate on August 15, 1969 (58a) but was accepted for the 1969-70 school year only because it promised some measure of desegregation and the court felt there was not sufficient time prior to the opening of the new school term for the development and implementation of a more effective plan. The failure of the board to accomplish what the plan had promised was determined on November 7, 1969 (82a).

The third plan was not a plan at all, but simply a statement of guidelines as to how the board intended to produce a plan. The guidelines promised no particular results and were thus rejected on December 1, 1970 (93a).

Judge Sobeloff traces this history in an extensive footnote (213a, n. 9). He concludes "[T]he above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn."

following the court's patient but unavailing efforts to secure from the board an acceptable desegregation plan, the failure of the board to carry out its minimal interim plan for 1969-70 which had been "reluctantly" accepted by the Court in August of 1969 and the mandate of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, that schools are to be desegregated "at once", Judge McMillan decided to seek assistance from an outside educational consultant to assist him in devising a unitary system (93a). The following day the court appointed Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (112a). The board was invited again to submit another plan (93a).

On January 20, 1970, plaintiffs requested that Dr. Finger bring in his plan so that the schools could be desegregated "at once".⁸ The Finger plan and a fourth board plan were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5

⁸ Plaintiffs' request followed the controlling decisions in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell v. Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970); and *Nesbit v. Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

This was not the first request by plaintiffs for immediate relief. In September of 1969 the plaintiffs' motion for a finding of contempt and for immediate desegregation had led to the court's finding in November that the board had not accomplished, during the 1969-70 school year, what it had been ordered to do (80a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt, objections to patently defective plans, motions enjoining school construction, motions to vacate state court orders, motions to add new defendants and motions to enjoin state officials from interfering with orders of the court. Despite these and other efforts in the district court, the court of appeals and this Court, the schools are no more desegregated now than in September 1968 when this round of litigation commenced.

directing the desegregation of the students and teachers of the elementary schools by April 1, 1970, and of the junior and senior high schools by May 4, 1970 (113a).⁹ The order was based upon the plan submitted by the board and Dr. Finger.

The school board appealed and sought a stay in the court of appeals. On March 5, 1970, the court of appeals stayed a portion of the order relating to the elementary schools and directed that the district court make additional findings concerning the cost and extent of the busing required by the February 5 Order (135a). The plaintiffs applied to this Court to have the partial stay rescinded; the application was denied.

The district court received additional evidence pursuant to the directives of the court of appeals and entered a supplemental Memorandum (159a) and Supplemental Findings of Fact (136a) on March 21, 1970.¹⁰

⁹ The order was slightly modified on March 3, 1970 (134a).

¹⁰ The supplemental findings were amended in certain respects on April 3, 1970, in response to a motion by defendants (181a).

During this period there were also proceedings concerning the North Carolina anti-busing law:

"In June of 1969, pursuant to the hue and cry which had been raised about 'bussing,' Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called 'anti-bussing' statute, N.C.G.S. 115-176.1 [supp. 1969]" (161a).

Plaintiffs were granted leave to file a supplemental complaint in July, 1969 and to add the State Board of Education and State Superintendent of Public Instruction as defendants to attack the statute. At that time the statute did not appear to the court to be a barrier to school desegregation (see 58a, 64a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds were to be expended for the transportation of students pursuant to the district court order of February 5 and several state judges issued *ex parte* orders of similar effect acting under color of the state statute. (See 277a, 229a-230a.) (Continued on p. 9)

The opinions and judgment of the court of appeals were filed on May 26, 1970. The court decided by a vote of 4 to 2 to vacate and remand the judgment of the district court for further proceedings. A majority for the judgment was created by the vote of Judge Bryan joining with the three members of the court subscribing to the plurality opinion written by Judge Butzner, although Judge Bryan dissented from the views expressed in the plurality opinion.¹¹

3. The Charlotte-Mecklenburg County School System in 1968-69

The plaintiffs presented to the district court detailed evidence about the school system, such as the number and location of the schools, the grades served, the kinds of programs offered, the achievement of the students in the different schools, the racial distribution of students and faculties in the system, and the changes which had occurred over the years. The plaintiffs also showed by expert

At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants and determined at that point that the constitutionality of the state statute was at issue. He therefore requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24 and on April 29, 1970, the court entered its decision (227a) declaring unconstitutional the portions of the statute prohibiting the assignment of any student "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing." The court, however, denied plaintiffs' prayer for injunctions.

¹¹ The judgment was vacated in its entirety. Judge Butzner's reason for this action was to give greater flexibility to the development of a new elementary plan. Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable. The judgment expressed Judge Bryan's hope that "upon re-examination the District Court will find it unnecessary to contravene the principle stated . . ." in his dissent.

testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.

The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.¹² Each succeeding order reflects a comprehensive analysis of new submissions of evidence by the parties and the cumulative evidence already before the court. The court of appeals has accepted the district court's findings (184a).

Judge McMillan's first opinion on April 23, 1969, gave a detailed description of the school system, the community which it serves and the extent of racial segregation within the schools (1a). We only summarize here some of the salient facts contained in the April opinion.

During the 1968-69 school year, students were assigned to the schools under the same plan as approved by the district court in 1965—initial assignments by geographic zones with freedom of transfer restricted only by school capacities.

The Charlotte-Mecklenburg school system serves more than 84,000 pupils residing in the city of Charlotte and Mecklenburg County. In April, 1969, there were 107 schools, including 76 elementary schools (grades 1-6), 20 junior high schools (grades 7-9) and 11 senior high schools (grades 10-12). The system employed approximately 4,000 teachers and nearly 2,000 other employees. The racial composition of the students in the system was approximately 71% white

¹² Significant findings are contained in eight of the orders leading to this appeal: Opinion and Order, April 23, 1969 (1a); Opinion and Order, June 20, 1969 (46a); Order, June 24, 1969 (57a); Order, August 15, 1969 (58a); Memorandum Opinion, November 7, 1969 (82a); Opinion and Order, December 1, 1969 (93a); Order, February 5, 1970 (113a); Supplemental Findings of Fact, March 21, 1970 (136a); and Further Findings, etc. (181a).

and 29% black. The residential patterns of the county were sufficiently integrated so that most of the county school zones included both black and white students. No all-black schools remained in the County. In the City, however, the residential areas were and are generally segregated by race,¹³ and most schools were racially identifiable.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black. The court further found that most of the de-segregated city schools were in transition from a previously all-white enrollment to all-black.¹⁴

The school system had been growing at approximately 3,000 students per year, requiring an on-going school construction program. With few exceptions, the size and placement of the recently constructed schools produced either all-white or all-black new schools.¹⁵

¹³ Most of the evidence concerning residential segregation was produced at the March 1969 hearings. The April order describes the housing patterns and some of the forces which created them. The matter was examined again in subsequent orders, particularly the Order of November 7, 1969 (82a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

¹⁴ In June, after further analysis of the data, the court concluded that approximately 21,000 of the 24,000 black students in the system lived within the city of Charlotte and that nearly 17,000 of them were attending black or nearly all-black schools. The figure is even greater if the black students attending schools which are rapidly becoming all-black are included. 11 schools served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965 and in 1968 served 5,757 students, 81% of whom were black. The court also found that nearly 19,000 of the more than 31,000 white elementary students attended schools which were nearly all-white. (There are only 150 black students attending these schools.) More than one-half of the 14,741 white junior high school students attend schools with a total black population of 193 (50a).

¹⁵ The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (141a; 142a).

The court found faculties segregated. The great majority of the 900 black teachers were teaching in black schools. There was less than one white teacher per black elementary school. The two black high schools had teaching staffs more than 90% black.

The court concluded that the board's policies of zoning, free transfer and its school placement had contributed to and continued an unlawfully segregated public school system. It also concluded that the faculties had not been desegregated as required by the 1965 order. The board was directed to produce plans for the active desegregation of the pupils and faculties by May 15, 1969.

On appeal, Judge Butzner agreed that the system was unlawfully segregated in April of 1969:

"Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was operating a dual system of schools in the light of subsequent decisions of the Supreme Court . . ." (184a, 185a-186a).¹⁶

The district court further found that the impact of segregation on black students in the system had resulted in the denial of equal educational opportunities. Comparative test results showed a wide disparity in achievement between students attending all-black schools and students attending white and integrated schools (58a, 65a-68a, 93a, 97a-99a, 136a, 144a-145a).

The court also found that the residential segregation was far from benign or *de facto*. The school board by gerrymandering zone lines (53a-54a) and other practices, together with the activities of other governmental agencies, had a significant impact upon the creation of Charlotte's

¹⁶ Both Judges Sobeloff and Winter concurred in this conclusion (201a, 217a).

ghetto. Again, the three circuit judges subscribing to the plurality opinion and Judges Sobeloff and Winter concurred in these findings. As Judge Butzner summarized:

The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property [footnote omitted] until *Shelley v. Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage.

The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (186a).¹⁷

¹⁷ In addition to the activities of the governmental agencies producing the discriminatory zoning (13a, 167a) and the urban renewal program (13a, 167a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (167a), that public housing officials had overtly discriminated until recent years and has reenforced racial segregation by its site selection (167a) and that those officials responsible for planning and building streets and highways have created racial barriers.

4. The Schools Today

During the 1969-70 school year the schools were operated under a desegregation plan submitted to the court in July 1969. The plan provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these children 3,000 were to come from 7 schools which were being closed and 1,245 from overcrowded black schools. The plan proposed some further faculty desegregation but would retain all other racially discriminatory features of the school system. The board did propose, however, to study its building programs and such measures as altering attendance lines, pairing, clustering and other techniques in order to develop a comprehensive desegregation proposal for the future.

The plaintiffs objected to the plan on the grounds that it left many schools segregated for yet another year and placed the full burden of desegregation upon black children.

The court, in an order entered on August 15, 1969 (58a), approved the proposed pupil reassignments for the 1969-70 school year "only (1) with great reluctance, (2) as a one year temporary arrangement and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." The board was ordered to file a third plan by November 17, 1969, "making full use of zoning, pairing, grouping, clustering, transportation and other techniques . . . having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible."¹⁸

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening

¹⁸ The board explicitly refused to follow these directives. Each of the next two plans submitted by the board rejected the techniques of "pairing, grouping [and] clustering". See n. 20, *infra*.

of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (72a).

The plan did not accomplish what was expected. The court later found that "the 'performance gap' is wide" (84a).

In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now [March 21, 1970] only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board (164a).

In the November, 1969 Memorandum Opinion the court set out in detail the racial characteristics of the school system during the 1969-70 school year (82a, 83a-88a). The court concluded that there had been no real improvement from the segregated situation found during the previous school year.

Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

The schools are still in major part segregated or "dual" rather than desegregated or "unitary." (86a).

Analyzing the same figures in a later order, the court pointed out that "Nine-tenths of the faculties are still

obviously 'black' or 'white.' Over 45,000 of the 59,000 white students still attend schools which are obviously white." (93a, 97a).

The court also determined that the free transfer provision in the board's plan negated any progress which the July plan might have produced.¹⁹ It also found that attempts to desegregate the schools by altering attendance lines would continue to fail as long as students could exercise a freedom of choice (87a-88a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (188a).

5. The Plan Ordered by the District Court

In the decision of December 1, 1969, in which the court announced that an educational consultant would be appointed, 19 principles were stated for his guidance (93a, 103a-108a). Dr. Finger's instructions included: "all the black and predominantly black schools in the system are illegally segregated . . ." (106a); "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but . . . variations from that norm may be unavoidable" (105a); "bus transportation to eliminate segregation [and the] results of discrimination may

¹⁹ The court had made similar findings in June:

Freedom of transfer increases rather than decreases segregation. The School Superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. (51a-52a)

Moreover, during the choice period prior to the 1969-70 school year, just two white students out of 59,000 elected to transfer to black schools and only 330 black students out of 24,000 chose to transfer to white schools (*Id.*)

validly be employed" (109a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (107a).

Dr. Finger's work is described in the Supplemental Memorandum of March 21, 1970:

Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report.²⁰ The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.

The detailed work on both final plans was done by the school board staff. (169a)

Both plans were presented to the court.²¹

a. *High Schools*—The school staff had developed a plan which produced a white majority of at least 64% in each

²⁰ The board's two most significant limiting factors were: (1) Rezoning was the only method to be employed; the board rejected such techniques as pairing, grouping and clustering; (2) a school sought to be desegregated would be at least 60% white; thus, the board's plan for elementary schools produced some schools between 57% and 70% white, eight schools 1% to 17% white, two schools 0% white and no schools between 18% and 58% white (126a-128a).

The court of appeals found as the district court had that these limiting factors were improper (197a-198a).

²¹ Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (113a, 119a-121a) and tables (123a-133a); Supplemental Findings, March 21, 1970 (136a, 146a-152a); Supplemental Memorandum, March 21, 1970 (159a, 169a-172a); Opinion of Court of Appeals (184a, 190a-191a).

of the ten high schools including the presently all-black West Charlotte (see Exhibit B, 123a). The board accomplished this result by restructuring attendance lines. Dr. Finger's proposal used the board's new zones and assigned an additional 300 pupils from a black residential area to Independence High School which would have had only 23 black students under the board's plan. Judge McMillan adopted the Finger modification. This portion of the plan was approved on appeal. Judge Butzner wrote:

The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent tipping or re-segregation of other schools. (195a)

b. *Junior High Schools*—During the 1969-70 school year the board operated 19 junior high schools. Five were all or predominantly black; eight were more than 90% white. (See Exhibit D, 124a.) The board, by rezoning eliminated several of the black schools. One school, however, Piedmont, remained 90% black. Additionally, four schools would be more than 90% white.²²

Dr. Finger devised a plan which would integrate all the junior high schools. Twenty of the schools would have white populations ranging from 67% to 79% and the remaining school would be 91% white. The plan employed rezoning and satellite zones.²³

²² Two new junior high schools are scheduled to open in the 1970-71 school year. Both proposed plans contemplate assigning students to these new schools. It is significant that under the board plan one of the schools would be 100% white and the other 91% white (124a).

²³ A "satellite zone" is an area which is not contiguous with the primary zone.

The district court approved of the board's plan except as to Piedmont, and gave the board four options: (1) rezoning to eliminate the racial identity of the remaining black school, (2) two-way transportation of pupils between Piedmont and white schools, (3) closing Piedmont, or (4) adopting the Finger Plan. The board reluctantly chose to employ the Finger Plan.

Judge Butzner found the plans for junior and senior high schools by use of satellite zones together with transportation "a reasonable way of eliminating all segregation in these schools" (195a).

c. *Elementary Schools*—The board in restructuring attendance lines for the 76 elementary schools was unable to affect a majority of the students attending racially identifiable schools. As the court of appeals observed, "Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white." (191a; see Exhibit H, 126a-128a.)

The Finger Plan also employed rezoning: 27 schools were rezoned, and 34 schools were desegregated by grouping, pairing and transportation between zones.²⁴ Judge McMillan described the plan:

Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of

²⁴ The designated clusters are shown in Exhibit K (132a-133a). The zones of ten schools remained substantially unchanged.

grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger Plan" itself . . . was prepared by the school staff It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools . . .". (150a-151a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 129a-131a.)

Judge McMillan found the board plan to be inadequate and directed that the Finger Plan or some other plan which would accomplish similar results be implemented.

The court of appeals agreed that the board plan was unacceptable. "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both black and white elementary pupils in schools that were nearly completely segregated" (197a). The court of appeals, however, decided that the extent of transportation required by the Finger Plan was unreasonable and directed further proceedings for the development of another plan.

d. *Transportation*—The district court's order required additional transportation to be provided. The plurality opinion approved of the increments of transportation to accomplish the junior and senior high assignments but determined that the elementary school busing was excessive.

During the 1969-70 school year, the board operated 280 school buses transporting 23,600 of its 84,000 students.³⁵ Another 5,000 students rode public transportation at a reduced fare. The principal's monthly bus reports show that between 10,000 and 11,000 of those riding school buses were elementary students. The average annual cost per child was about \$20.00 or about \$472,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.³⁶ The buses average 1.8 one-way trips per day carrying an average of 83.2 students, averaging 40.8 miles (136a, 138a).³⁷

³⁵ Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state and the county, in his Supplemental Findings of March 21, 1970 (135a). (See also Further Findings, etc. of April 3, 1970.) The court had examined the transportation system in previous decisions as well (1a, 22a-23a, 40a, 47a-48a, 113a, 116a-117a).

³⁶ See Further Findings, etc., April 3, 1970 (181a-182a). The district court had originally understood the average cost to be about \$40.00 per pupil (1a, 22a-23a, 136a, 138a). The state reimburses local school boards for operating expenses for transportation for those students who are eligible under state law. The original cost of the bus is borne by the local board but the state replaces worn out buses (181a-182a).

Pupils eligible for transportation are those children who live more than 1½ miles from school and who live either in the county or in portions of the city which have been annexed since 1957. Additionally, the state pays the transportation costs for children who live within the pre-1957 city limits who attend schools outside of the pre-1957 limits (136a, 141a).

All but a few hundred of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense (155a).

³⁷ The overall figures for the state show a higher percentage of students riding buses than in Charlotte. During the 1968-69 school year about 55% of all students in North Carolina rode buses to school; 70.9% were elementary students. (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

Judge McMillan's Findings as accepted by the court of appeals show the added transportation under the plan ordered on February 5 to be:

	<i>No. of Pupils</i>	<i>No. of Buses</i>	<i>Operating Costs</i>
Senior High	1,500	20	\$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,300	138	\$266,000 ²⁸

The initial one-time²⁹ capital outlay for the buses would be \$745,200.³⁰

The board itself had proposed the busing of 4,200 black inner-city children for the 1969-70 school year to outlying suburban schools as a desegregation measure (58a, 63a-65a). The board's February 2 plan proposes to bus approximately 5,000 additional students, about half of whom are elementary pupils. A major portion of this busing is within the City (155a, 192a). Moreover, there is nothing novel

²⁸ These are the figures determined by the court of appeals (191a) by applying the district court's Further Findings, etc. of April 3, 1970 (181a) to its Supplemental Findings of March 21, 1970 (136a).

The board had claimed much greater increases in the extent and cost of additional busing, but the district court, after carefully analyzing the data, found the board's figures to be exaggerated (see "Discount Factors," 136a, 152a-154a). The court's findings are also consistent with the transportation requirements projected by the board for its plan to transport 3,000 Negro children to the suburbs for the 1969-70 year. (See Report filed in summer of 1969, Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

²⁹ Obsolete buses are replaced by the state. See note 24, *supra*.

³⁰ The district court observed that there was at least 3 million dollars worth of vacant school property which had been abandoned pursuant to the 1969-70 desegregation plan (157a) and which, as the board had pointed out in its report in the summer of 1969, could be disposed of to produce necessary "desegregation" funds. (See Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

about city children riding school buses. Children living in the city but outside of the 1957 city limits are bused. Many city boards of education, such as Greensboro, provide transportation for city children with local funds. The present state superintendent of public instruction, his predecessor and the prestigious 1969 Report of the Governor's Study Commission on the Public School System of North Carolina have all recommended that transportation be provided for children, city as well as rural, on an equal basis (136a-140a).

The bus trips required for the paired elementary schools would be straight-line non-stop trips (143a), would be shorter and would take less time than the average bus trip in the system or in the state (137a).

34. . . .

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools (153a).³¹

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (138a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (141a, 142a).

³¹ The court later explained how these figures were developed:

The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus *trip* mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates—taking straight line mileage and adding 25%. (Emphasis in original; 153a.)

REASONS FOR GRANTING THE WRIT

Introduction

This case merits review on certiorari because it involves important legal questions about implementing *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955), and because it will have important practical consequences with respect to school desegregation. In petitioners' view the major questions presented are the related issues about the proper formulation of specific desegregation goals and the proper standard for appellate review of a decision on the feasibility of a desegregation plan.

In Part I, *infra*, we submit that on this record the district judge was correct in his specific formulation of the goal of eliminating each predominantly black and all-black school. We believe the court of appeals erred by substituting a less concrete and complete goal requiring "all reasonable means to integrate the schools" but that not every school "need be integrated."

The decision below announces a legal rule of great consequence. The court below, by a narrow vote (actually three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new legal principle requires that in each case a court must decide whether the goal of complete desegregation of all schools is a reasonable goal. Thus we have not merely an issue about the reasonableness of methods of desegregation but rather an issue about the reasonableness of the goal of desegregation—whether the court thinks desegregation is worthwhile given the circumstances of the district.

As Judge Sobeloff has stated so clearly in dissent, the new rule portends serious consequences for the general course of school desegregation:

. . . Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome." (212a-213a)

As thus framed, the issue of appropriate goals for desegregation plan is one which merits this Court's expeditious attention. The struggle to implement *Brown* may founder on the new rule that segregation must be ended only where it is "reasonable" to end "black" and "white" schools. This Court's decision in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), may be of little effect if a kind of reasonableness test on desegregation timing is replaced by a similar test for deciding the goal.

In Part II, *infra*, we urge that the court of appeals applied an inappropriate standard for appellate review of an equitable remedy in setting aside the district court's elementary school plan as "unreasonable." Where no equally expeditious and effective plan is available, we think it contrary to this Court's decisions for an appeals court to strike down an effective plan which has been reliably found to be feasible and workable. Moreover, the appellate court's view that the remedy was too onerous was influenced by its erroneous determination that it was unnecessary to integrate every school in Charlotte, as discussed in Part I.

In addition to these clear legal issues, the case should also be reviewed because the ultimate decision in this case will have enormous practical impact on the future of public school desegregation. The case is singular in a number of respects. The decision of the district judge on February 5, 1970, which has now been set aside in important part, immediately assumed national significance and became the focus of much public attention because it promised the complete desegregation of every school in an urban school system. There was this promise of complete desegregation, notwithstanding the complexity of a system with 106 schools and more than 84,000 pupils, the recalcitrance of the locally elected school board, and the concentration of most Negro residences in one area where a number of all-black schools were maintained. Recent years have seen considerable school desegregation progress in smaller towns and rural areas of the South. This is partly because available remedies are more obvious in small school systems. But most often Negro plaintiffs have been unable to accomplish anything more than partial desegregation in urban systems.

Judge McMillan's decision in the Charlotte case finds a way to break the pattern and integrate every school in North Carolina's largest school district. The Fourth Circuit's decision reversing the plan for elementary school desegregation blots out the rays of hope that complete school desegregation will be accomplished in urban schools. The result on this appeal clearly signals to every district judge and school board that a cautious "go-slow" approach to using busing to eliminate all-black schools is in order. Judge McMillan's decisions signaled that substantial desegregation can be accomplished; the reversal signals that it will not be accomplished. So the result of the case has assumed transcending importance. What the Fourth Circuit did speaks as loudly as what it said. What the court

did, of course, was overturn one of the first desegregation orders that ever required complete urban school desegregation in the circuit.

We hasten to add, particularly in view of our request for expedition and our suggestion that summary disposition might be appropriate, that the case may well be controlled by settled decisions. Although the opinion below raises the new legal issues we have discussed, they need not necessarily be decided in the terms in which the court of appeals posed the issues. Given the findings of the district judge, which are not clearly erroneous, the desegregation plan for Charlotte may be ordered implemented in September without breaking any new legal ground. The district court's decision is supported by a complete record proving that the existing school system is unconstitutional and that a feasible remedy is at hand. The meticulous and painstaking decisions of the district court are ample support for a decision that the plan should be implemented as scheduled.

I.

This Court's School Desegregation Decisions Support the District Court's Holding That the All-Black and Predominantly Black Schools in Charlotte Are Illegally Segregated and Should Be Reorganized So That No Predominantly Black Schools Remain. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. The Remedial Goals Set by the Courts Below.

This case involves whether it was proper, on the record and findings made, for the district judge to require that the racially segregated dual system in Charlotte-Mecklenburg be thoroughly reorganized so that each of 25 remain-

ing all-black or predominantly black schools in the system will be integrated. Understanding of the issue is aided if we analyze the particular facts of the Charlotte case as well as the general legal principles which apply in school segregation cases.

On December 1, 1969, nearly five years after this suit was filed by Negro plaintiffs seeking desegregation, District Judge McMillan held that:

On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . (106a).

Thereafter, on February 5, 1970, when a concrete plan had been designed by the court's expert consultant after working for two months with the local school superintendent and his staff, it was apparent to Judge McMillan that there was a feasible way to eliminate the black schools he had found to be illegal. He thus ordered that "no school be operated with an all-black or predominantly black student body" (116a), and the plan was ordered under which the percentage of black students would vary in individual schools from a high of 41% black to a low of 3% black (156a). Thus the district court first found the black schools illegal, and then found that their continuation was needless and that there was an available remedy for the unconstitutional situation.

This seemingly straight-forward sequence of events has been nullified and the mandate of the appeals court now requires that desegregation planning for Charlotte's 76 elementary schools begin anew. Petitioners believe that the court of appeals has not stated the goal of desegregation planning in suitably specific terms to satisfy the consti-

tutional requirement and that the district court's formulation was proper, at least for the Charlotte-Mecklenburg system.

The court of appeals ruling, in the practical context of the case, requires that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools. The opinion for three members of the court, by Judge Butzner, states that "not every school in a unitary system need be integrated" and that while boards "must use all reasonable means to integrate the schools" sometimes "black residential areas are so large that not all schools can be integrated by using reasonable means" (189a). This view acknowledges that the black schools are the product of illegal segregation practices, but suggests that the problem is essentially intractable and that there is in effect a wrong without a remedy. The wrong is not remedied if you discount as we do, the three alternatives to integrating the black schools mentioned by Judge Butzner, *e.g.*, providing an integrated school for each child in later years, relying on the black pupils' use of a free transfer right to leave the black schools, and establishing special integrated programs at the all-black schools. None of these suggestions represents a complete substitute for the constitutional right to attend school in a system where racial identification of the schools has been removed and there are "just schools." *Green v. County School Board of New Kent County*, 391 U.S. 430, 442 (1958). The first method merely postpones the right and does not grant it "now and hereafter" (*Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969)). The second method—free transfers for blacks—has proven illusory and only a partial answer in Charlotte-Mecklenburg. *Green, supra*, and *Monroe v. Board of Commissioners*, 391 U.S. 450 (1958). The third method by its own terms is limited to peripheral activities not central to the daily classroom experience

of grade school children, and fails to remove the racial identifiability of the schools.

We believe that Judge McMillan was correct, and that the court below was in error, in defining an appropriate specific desegregation goal for Charlotte. Judge McMillan's findings and conclusions that the all black schools and predominantly black schools in Charlotte-Mecklenburg are unconstitutionally segregated were accepted by all members of the court below except Judge Bryan, who wrote a separate dissenting opinion. Fortunately, this case contains an unusually detailed and extensive factual record, and meticulous findings which explain how racial segregation was created in the Charlotte system. The detailed record showing how the dual system was created makes the case an appropriate one to consider the important questions relating to remedial measures. We set out in detail in the next subsection the findings about the causes of school segregation, the related findings about the governmental responsibility for housing segregation in Charlotte, and the particular findings about the effects of the denial of equal educational opportunity on black children in this locality. In a succeeding subsection we discuss the governing legal principles which support Judge McMillan's statement of the desegregation goal.

B. *The Dimensions, Causes, and Results of the Dual System in Charlotte—The Nature of the Constitutional Violation.*

Judge McMillan found that governmental authorities had created black schools in black neighborhoods in Charlotte by promoting school segregation and housing segregation. The board "gerrymandered" or manipulated school attendance areas to promote segregation, selected sites and the sizes of schools to promote segregation, and used the school transportation system to promote segregation. The court

found that the extensive residential segregation which concentrated 95% of the city's Negroes in Northwest Charlotte was promoted by public authorities, including school practices and those of other government agencies.

Judge McMillan summarized the results by noting that although the slightly more than 24,000 Negroes in the system were but 29% of the total school population, more than 16,000 Negroes were in 25 all-black or predominantly black schools, including more than 9,000 in 11 100% black schools (165a). He concluded that: "The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved" (166a). At the same time, more than two-thirds of the white pupils (45,012 out of a total of 59,828) were in 57 schools readily identifiable as white schools (165a). Less than one-fifth of the pupils in the system attended 24 schools not readily identifiable by race (165a-166a).

Judge McMillan summarized the findings about how this extensive segregation came about in these words:

The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning

ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or '*de facto*' and the resulting schools are not 'unitary' or desegregated (166a-167a).

The Fourth Circuit accepted these conclusions (186a-187a), and also pointed out as one aspect of this, that North Carolina Courts had enforced racial restrictive covenants on property prior to *Shelley v. Kraemer*, 334 U.S. 1. See e.g. *Phillips v. Wearn*, 226 N.C. 290, 37 S. E. 2d 895 (1946) (involving property in Mecklenburg); *Eason v. Buffaloe*, 198 N.C. 520, 142 S.E. 496 (1930); *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58 36 S. E. 2d 710 (1946). These racial restrictive covenants enforced by injunctions and damage suits were the functional and practical equivalent of residential segregation laws and ordinances.²²

Nor was the decision below unique in recognizing the inter-relationship between school segregation and state responsibility for residential segregation. See *Holland v. Board of Public Instruction of Palm Beach County*, 258 F. 2d 730, 732 (5th Cir. 1958); *Dowell v. Board of Education*, 244 F.

²² *Shelley* was argued in this Court on this basis (by the Solicitor General among others) as Mr. Justice Black has described:

This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts. (*Bell v. Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black, dissenting.)

Supp. 971, 975-977 (W.D. Okla. 1965), affirmed 375 F. 2d 158 (10th Cir. 1967), cert. denied 387 U.S. 931 (1967), both involving residential segregation ordinances. Cf. *Brewer v. School Board of the City of Norfolk*, 397 F. 2d 37, 41-42 (4th Cir. 1968).

Judge McMillan also made explicit findings based upon his examination of the local system about the harm that segregation was inflicting upon black children. Judge McMillan found "that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children." (66a-67a). Sixth grade students in black schools were on the average achieving at a fourth grade level, whereas there were substantially higher levels in integrated and white schools. (20a; 67a; 97a-99a). The District Judge wrote that:

"This alarming contrast in performance is obviously not known to school patrons generally.

It was not fully known to the court before he studied the evidence in the case.

It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.

The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.

Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.

It is painfully apparent that "quality education" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.*

As hopeful relief against this grim picture is the uncontradicted testimony of the three or four experts who testified, some for each side, and the very interest-

ing experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.) (67a-68a)

Legally, of course, the case does not depend on any such local findings of harm. "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). But it is well to remember that the segregation system condemned by *Brown* is a massive intentional disadvantaging of the Negro minority by the white majority. See Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421 (1960). That disadvantage is not dissipated so long as the dual system is intact. The district judge perceived that its elimination is an urgent task.

C. The Decision Below Conflicts With Applicable Decisions of This Court.

The district court's decision that each of the predominantly black and all-black schools in Charlotte-Mecklenburg must be reorganized on an integrated basis is in conformity with this Court's decisions defining the nature of the duty to desegregate public schools which was first declared sixteen years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown II* spoke of the need "to achieve a system of determining admission to the public schools on

a nonracial basis." *Brown v. Board of Education*, 349 U.S. 294, 300-301 (1955). In *Cooper v. Aaron*, 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bring about the elimination of racial discrimination in the public school system." *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), made it clear that *Brown* requires more than nondiscriminatory admission of Negroes to "white" schools. *Green* held that *Brown* was addressed to the whole system of segregation in which "racial identification of . . . schools was complete, extending not just to the composition of student bodies . . . but to every facet of school operations . . ." (391 U.S. at 435). Under *Green* these dual systems must be abolished; the task is the "dismantling of well-entrenched dual systems" (391 U.S. at 437), and "disestablishing state-imposed segregation" (*id.* at 439). The *Green* decision states that a "unitary, non-racial system of public education was and is the ultimate end to be brought about" (*id.* at 436), that discrimination must be eliminated "root and branch" (*id.* at 438), and that the Constitution required "abolition of the system of segregation and its effects" (*id.* at 440). The courts are to render decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*id.* at 438, note 4). The courts are to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). A call for the complete abolition of racially identifiable schools is sounded by the command that the plan "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442).

Judge McMillan addressed himself to the most obvious remaining characteristic of the dual system in Charlotte—the 25 black schools which serve the bulk of the black population. By the time Judge McMillan wrote his opinion

on December 1, 1969, the school board had failed despite three orders to present a plan which eliminated the black schools. Judge McMillan perceived that school segregation could not be justified or excused on the basis of segregated neighborhood patterns where the state itself was responsible for Fourteenth Amendment purposes for the housing segregation as well as the school segregation.³³ Thus he faced the practical problem of formulating specific instructions and criteria for the men preparing a desegregation plan. He believed that the concern was "primarily not with the techniques of assigning students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools*. The test is pragmatic, not theoretical" (61a). In order to guide his court appointed consultant in preparing a plan, Judge McMillan stated simple legal guidelines and criteria. They are in the spirit of *Green* and are entirely unexceptionable:

2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful . . . [citations omitted].

* * *

12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had

³³ *Dowell v. Board of Education*, 244 F. Supp. 971, 975-977 (W.D. Okla. 1965), *affirmed*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Holland v. Board of Public Instruction of Palm Beach County*, 258 F.2d 730, 732 (4th Cir. 1968). Geographic zoning plans are acceptable only if they tend "to disestablish rather than reinforce the dual system of segregated schools." *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086, 1093 (5th Cir. 1969); *Henry v. Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir. 1969); *United States v. Indianola Municipal Separate School District*, 410 F.2d 626 (5th Cir. 1969); *Keyes v. School District Number One, Denver*, 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated*, 396 U.S. 1215 (1969) (Justice Brennan in Chambers). And see this Court's decision in *Northcross v. Board of Education of Memphis*, 397 U.S. 232 (1970).

presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

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14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation . . . [citations omitted].

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . [citations omitted].

• • •

17. Pairing of grades has been expressly approved by the appellate courts . . . [citations omitted]. Pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this county ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools.

The court of appeals decision that some indefinite number of black schools may remain conflicts with *Green*. There

is no warrant in *Green* for anything less than complete dismantling of the dual system. The holding that racial identifiability of schools need not be redressed threatens, as Judge Sobeloff has suggested, to water down or temper the duty to convert to a unitary system (203a). The conclusion that the board need accomplish only so much desegregation as seems "reasonable" poses a fundamental threat to the principle of *Brown I*. As Judge Sobeloff wrote, dissenting, "the conclusion of the majority that, all things considered, desegregation of this school system is not worth the price" is a "conclusion neither we nor school boards are permitted to make" (210a).

The district court had power under the *Green* decision to require much more than a minimal sort of plan. The court was not bound to accept school board proposals designed to search out the gray area between a dual system and a unitary system to satisfy minimum desegregation requirements. On the contrary, the court was empowered to strike at the roots as well as the branches of the segregated system. The court was empowered to root out segregation so thoroughly that it is unlikely to occur again. The opinion below in part recognizes this by approving the trial judge's efforts to prevent re-segregation of desegregated schools at the high school level.³⁴ But the essential thrust of the decision conflicts with this idea. It seems clear that the opinion approves the continuation of some majority black schools. But experience in Charlotte has demonstrated the difficulty of maintaining stable desegregation in majority black schools. Frequently such schools fast become all-black as neighborhood patterns change in an oft-repeated pattern of white flight from Negro neighborhoods and

³⁴ The court below approved the trial judge's effort "to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent 'tipping' or resegregation of other schools" (195a).

schools. Judge McMillan's plan was designed to cope with this problem by eliminating all racially identifiable schools so that this factor would no longer play a part in the community.

The court of appeals' goal of obtaining as much integration as is "reasonable" in the jurisdiction must leave every board or court which seeks to apply the formula essentially at sea. The standard of reasonableness was adopted, says the court, because "some cities . . . have black ghettos so large that integration of every school is an improbable, if not unattainable, goal." But, of course, the Finger plan demonstrates that this goal is not unattainable in Charlotte-Mecklenburg. And Charlotte-Mecklenburg, the largest school system in North Carolina, is fairly representative of the desegregation problem in the cities of the Fourth Circuit. The United States Commission on Civil Rights had recently made the same point:

It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and creates no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size. (Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

Judge Butzner's decision suggests that complete desegregation can be obtained only in "towns, small cities, and rural areas" by the available techniques. But this very

record demonstrates that the technology is available to design desegregation plans for a city the size of Charlotte which will do the job of desegregating the schools. In part II which follows, we shall discuss the evidence about the workability of this plan.

II.

The Court Below Erred in Not Accepting the District Court's Decision That Its Desegregation Plan Was Feasible and in Setting It Aside as "Unreasonable," Particularly in the Absence of Any Equally Effective and Expeditious Alternate Plan.

The district judge in this case faced an acute practical problem in formulating a remedy to redress the violations of the Constitutional rights of black children in the Charlotte-Mecklenburg system. The system is large with 84,542 pupils in 106 schools. School segregation is still extensive with more than three-fourths of the children still in racially identifiable "white" schools or "black" schools. Some of the integrated schools have rapidly moved through a temporary integration to an all-black re-segregated situation. The free transfer plan was a conspicuous failure. To make matters worse, the school board refused to accept its duty of preparing an adequate plan. The board attacked the judge's decisions in public forums and the state legislature enacted an anti-busing law to nullify his decisions. The board did not even deliver on desegregation promises in its interim plan for 1969-70. In the summer of 1969 the black community had protested "one-way" desegregation in the interim plan by which only black pupils were bused to white schools and formerly black schools were abandoned. White parents groups were aroused against "busing" by televised school board meetings decrying the destruction

of "neighborhood schools." Against this background in October 1969, the board requested a delay in filing a desegregation plan. The judge regretfully concluded:

The school board is sharply divided in the expressed view of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools. By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance." (90a-91a)

Judge McMillan had no choice but to deny the requested delay in view of this Court's then recent decision in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (October 29, 1969). The school board then filed a third plan which the court later held "contains no promise or likelihood of desegregating the schools" (93a).

The singular thing about this case is that faced with this panoply of obstacles and difficulties, the district judge promptly found a means to completely integrate every school. He adopted the reasonable procedure of: (1) writing detailed legal guidelines for the preparation of a desegregation plan, (2) appointing the court's own expert consultant to devise a plan, and (3) ordering the professional staff of the Charlotte school system to work with the court's expert and give him full cooperation.³⁵ The

³⁵ The board was ordered to provide the consultant with work space, pay his fees and expenses, give him stenographic assistance, the help of business machines, draftsmen, and computers, as well as

procedure worked. By February 5, 1970, about two months after the expert's appointment, the court was able to approve the plan. Over plaintiffs' objection, and at the board's request, implementation was postponed until later in the spring to enable the board to make further preparation.³⁶

The decision of the court of appeals approved the plan for junior and senior high schools rejecting the school board's appeal in this regard. But the elementary school plan was struck down because three judges of the court below held it was not "reasonable," and a fourth judge thought the plan undertakes the illegal objective of "achieving racial balance" by busing pupils.

To summarize petitioners' position briefly, we think the ground for disapproving the elementary plan—that the bus-

access to all the board's studies, including computer studies, of desegregation plans. The school staff was ordered to provide the consultant with "full professional, technical and other assistance" (110a). The Fourth Circuit approved this procedure citing Justice Brandeis' opinion *In the Matter of Peterson*, 253 U.S. 300 (1920). See also, *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2nd Cir. 1962); 9 Wigmore, Evidence § 2484 (3rd Ed. 1940), 2 Wigmore, Evidence § 563; McCormick, *Some Observation Upon the Opinion Rule and Expert Testimony*, 23 Texas L. Rev. 109, 131 (1945) (cases recorded as early as the 14th Century); cf. Rule 28 Fed. R. Crim. P., 18 U.S.C. (providing for court appointed experts in criminal cases). The appointment of a court-appointed expert panel to devise a school desegregation plan was approved in *Dowell v. Board of Education*, 244 F. Supp. 971, 973 (W.D. Okla. 1965), *aff'd* 375 F.2d 158, 162 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967). If a court has the equity power to award plaintiffs counsel fees against a foot-dragging school board (*Bell v. School Board of Powhatan County, Va.*, 321 F.2d 494 (4th Cir. 1963)), *a fortiori*, the court can take the milder course of taxing costs necessary to enable the judge to frame his decree. This is all the more appropriate because the case so plainly involves the public interest.

³⁶ After the court of appeals stayed part of the plan pending appeal, the district judge concluded that the integration requirement was no longer so urgent and postponed the entire plan until September 1970. Petitioners unsuccessfully opposed each delay and cross-appealed the delay order. The school year ended without any Fourth Circuit action on petitioners' motion to set aside the stay.

ing involved is too onerous for the board—is in Judge Winter's phrase, "insubstantial and untenable" (218a). Judge McMillan has ordered a very feasible and sensible plan. It promises to eliminate segregation immediately. There is no other plan in the record which is equally effective. The district court's determination that the plan is feasible is supported by substantial evidence and the findings to this effect were accepted on appeal as not clearly erroneous. Acceptable procedures were used to formulate the plan. There is no basis for concluding as a matter of law that the plan is "unreasonable." There was no abuse of discretion in formulating the remedy. The arguments about illegal busing to achieve racial balance and the neighborhood school theory are also legally insubstantial.

The district court acted within the limits of its discretion in fashioning an equitable remedy for the present unconstitutional system. The Finger Plan meets the principal test established by *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), in that it does promise to dismantle the dual system and provide a unitary system of schools. It will produce a system without a single school which might be labeled a "white" school or a "black" school. The elimination of racially identifiable schools promised by this plan produces the *result* called for by *Green, supra*.

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segregation, there would be room for discussion about which plan is most desirable. But, Judge McMillan demonstrated that he was prepared to accept school board alternatives which produced equal results in accomplishing desegregation. He preferred such "home-grown products" even where he believed the expert consultant's proposals were more efficient. But an essential finding which supports the Finger Plan for elementary schools is Judge McMillan's conclusion that it

was *necessary* to adopt a plan of this type to accomplish the result of desegregation. The court found:

Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (146a)

Judge Sobeloff's dissenting opinion, noted that "The point has been perceived by the counsel for the board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it" (204).

The elementary plan ought to be upheld if the case is governed by the traditional rule for appellate review of a chancellor's decree in equity. The prevailing rule is that equitable discretion in framing remedies is necessarily broad and that a strong showing of abuse of discretion must be made to reverse such a decree. *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Continental Illinois Nat. Bank & Trust Co. v. Chicago R. I. & P. Co.*, 294 U.S. 648, 677 (1935); *United States v. Corrick*, 298 U.S. 435 (1936); *Rogers v. Hill*, 289 U.S. 582 (1933). In order to set aside the equity decree the appellant "must demonstrate that there was no reasonable basis for the district judge's decision," and thus that the remedy is so lacking in rationality as to amount to an abuse of discretion. *United States v. W. T. Grant Co.*, *supra*, 345 U.S. at 634.

This Court's decisions in school cases have relied on traditional equitable principles on remedial issues. In the second *Brown* decision the Court invoked the tradition of

equity which was said to be "characterized by a practical flexibility in shaping its remedies and by a facility for reconciling public and private needs" (349 U.S. at 300). The *Brown II* Court cited with approval a passage in *Alexander v. Hillman*, 296 U.S. 222, 239 (1935), stating.

Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and properly to enforce substantial rights of all the parties before them.

In *Griffin v. School Board*, 377 U.S. 218, 232-233 (1964), the Court said that "relief needs to be quick and effective," and that a federal court could require a county to levy taxes if necessary to maintain a non-discriminatory public school system. *Green v. County School Board*, 391 U.S. 430, 439 (1968), emphasized that in formulating a remedy district courts were to assess "the circumstances present and the options available in each instance." In *United States v. Montgomery County Board of Education*, 395 U.S. 225, 235 (1969), the Court emphasized that "in this field the way must always be left open for experimentation." In the *Montgomery County* case the Court reversed a court of appeals decision which labeled the district judge's order too rigid and inflexible in favor of the trial court's "more specific and expeditious order." Finally, in decisions this term the Court has limited the discretion of the courts to delay relief by making it plain that the "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Dowell v. Board of Public Education of Oklahoma City*, 396 U.S. 269 (1969).

There is nothing in this development of school desegregation law since *Brown* which warrants the departure from the traditional rule of appellate review announced by the plurality opinion of Judge Butzner for the court below. This new test of "reasonableness" enables the reviewing court to set aside the trial court's discretion on the ground that the appeals court majority would prefer another mode of relief albeit less effective. This runs exactly counter to the spirit of *Green* which declares that the result—actual desegregation—is the imperative thing and that the methodology of desegregation plans is secondary. It also runs counter to the philosophy of *Alexander, Carter and Dowell, supra*, which place a premium on the immediate implementation of constitutional rights pending the completion of litigation. The reasonableness test allows so much scope for unpredictable reversals of those decrees which accomplish actual desegregation as to substantially nullify *Alexander*. The reasonableness test signals the need for trial courts to adopt a "go-slow" cautious approach. Although busing is approved in principle in the opinion below, the result makes it clear that busing must be limited. The standard of "reasonableness" is broad and vague, but it does not allow broad discretion for trial courts to order busing. Any plan found objectionable by a school board can colorably be said to be "unreasonable" justifying at least a stay pending appeal. The "reasonableness" test is "deliberate speed" in a new guise.

The district court's decision that the Finger Plan is feasible is in any event supported by substantial evidence. It was error for the court of appeals to substitute its own finding of "unreasonableness" where there was no claim that the district court's findings were clearly erroneous. Cf. *Northcross v. Board of Education*, 397 U.S. 232, 235 (1970) As Judge Sobeloff has shown, in dissent, "there is no genuine dispute" on the feasibility of the plan; it is "simple and quite efficient" (206a). Here are the facts.

The Finger Plan requires transportation of pupils to accomplish desegregation. The system now transports 23,600 pupils by school bus and another 5,000 by common carrier.³⁷ The school board's proposed plan would bus about 5,000 additional children³⁸ but still would not desegregate the system, leaving 10 Negro schools.³⁹ The board's plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)⁴⁰ will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to secondary students (1,500 senior high and 2,500 junior high pupils), but reversed the requirement as to elementary pupils (9,300 pupils, including 1,300 in schools to be simply rezoned, and 8,000 involved in cross busing between paired schools).⁴¹

The court carefully considered the busing from the standpoint of the children. The crucial finding is this:

The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense. (143a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.⁴² Eighty percent of the buses in the system require more than one

³⁷ See 138a.

³⁸ See 155a.

³⁹ The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (120a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (124a).

⁴⁰ See 157a.

⁴¹ *Ibid.*

⁴² See 142a, 153a.

hour for a one-way trip now."⁴³ The average one-way trip under the court plan "for elementary students is less than seven miles, and would appear to require not over 35 minutes at most, because no stops will be necessary between schools."⁴⁴

Judge Butzner's opinion approves "bussing [as] a permissible tool for achieving integration, but . . . not a panacea." He wrote that in deciding on busing boards "should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." This ruling is enlightened and progressive as used to approve busing plans for secondary schools. But it fails to satisfy constitutional requirements, if it means, as it apparently does, that these factors are to be weighed in determining whether schools will be integrated at all. There is no suggestion in the opinion that the majority found the Finger plan wanting in terms of the "age of the pupils", since busing elementary pupils is an established tradition in this system. There was no suggestion that the times and distances involved were excessive since they plainly compared favorably with the present practice. The determination to reverse the elementary plan is put entirely on the cost factor.

To begin with, the court below states the cost issue not in dollar terms, but in terms of the increased percentage of busing. Thus the cost is not considered in terms of its "relation to the board's resources" but only in relation to present expenditures for busing. Even on this basis the plan will require less busing in Charlotte than the statewide average of 54.9% of the pupils (137a). But the

⁴³ See 142a.

⁴⁴ See 153a. "The average *straight line* mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles." (183a) The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%.

"board's resources" in this context are much broader than the local funds because in North Carolina transportation costs are largely met by the State, which replaces all buses after the local authorities make the first purchase, and bears most of the operating costs. The total annual cost per pupil is about \$20 in the system. (Note that the \$39.92 figure mentioned several times in opinions is erroneous and is corrected to \$20 at 181a-182a.) Virtually the entire cost is borne by the State, except for one-time bus purchase costs and incidental administrative costs and parking expenses. The capital outlay required for the elementary busing is \$5,400 per bus for 90 vehicles, or \$486,000. This investment will bring not only vehicles with useful lives of ten or more years but also the right to have them perpetually replaced at no further local cost by the state board of education. Operational costs (reimbursed by the State) for the added elementary busing were found to be \$186,000 annually (191a, 181a-182a).

When these expenditures are considered in the context of the local budget figures and the state budget figures they are so small as to be insignificant. The 1969-70 budget for Charlotte-Mecklenburg is \$57,711,344, and future years may bring even larger expenditures. Between six and seven million dollars represents capital outlay and debt service. School construction is not included in these figures. In 1968-69 the state's education budget was over 3.59 billion dollars and this included over \$14 million spent on transportation for an average of 610,760 pupils daily. Given this financial framework, the decision below that there is a financial barrier to integrating the local school system cannot be sustained. The appropriate principle was stated in *Cooper v. Aaron*, 358 U.S. 1, 19, where a unanimous court declared that:

State support of segregated schools through any arrangement, management, funds or property cannot be

squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

We live in a society where it is a commonplace for government to spend vast sums to protect the constitutional rights of our citizens. New York City in recent weeks is reported to have spent a million dollars for overtime police protections for pro- and anti-war demonstrators in the streets. Examples could be proliferated. The rights of black children to an equal educational opportunity cannot be sacrificed on the ground that it costs too much to grant equal treatment. If necessary, the federal courts may even command that the money be levied and spent to redress denial of constitutional rights. *Griffin v. School Board*, 377 U.S. 218 (1964). But this case involves merely a decision about how existing resources are allocated. As a matter of fact, at the time of the judge's supplemental findings of March 21, 1969, the state board of education (a defendant in this case) had "approximately 40 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (157a). "The problem is not one of availability of busses but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case" (157a-158a).

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the decision approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (211a). The major distinction between the busing which is approved and that which is rejected is that the secondary plans primarily increased busing of black students to formerly white schools while the elementary plan requires busing of white children as well as Negroes. We are unlikely to ever end the dual

school systems until it becomes accepted that the inconveniences incident to reorganizations of the school systems will not be borne by black pupils alone but will be shared by the white community. Equal protection does require that desegregation plans be generally equitable and not place the entire burden on blacks. Judge McMillan announced at the time he approved the interim plan for 1969-70 that he would not again approve a plan for one-way busing (69a-70a). He wrote that:

If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. (70a)

Judge McMillan's plan should be approved as an intelligent effort to comply with the *Brown* decision. When first considering the idea of eliminating all racially identifiable schools by a percentage formula he pointed out that:

... it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the New Kent County language, would be "just schools"; it would make all schools equally "desirable" or "undesirable" depending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county . . . ; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like sur-

gery be the most conservative solution to the whole problem and the one most likely to produce good education for all at a minimum cost.

This record shows that there is no reason not to use school buses to integrate the schools except to keep them segregated. Busing is a legitimate technique of educational administration. In Charlotte schools today, the walk-in neighborhood school is primarily a phenomenon in the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (142a); no black school depends very much on school buses. By contrast, white schools have the opposite pattern, and "suburban schools, including the newest ones, have been located far away from black centers, and where they cannot be reached by many students without transportation" (*ibid.*). The Center for Urban Education recently said that "Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900. And, until recently, it had conveyed no emotional overtones other than nostalgia for lost youth." ("On the Matter of Busing: A Staff Memorandum from the Center for Urban Education", February 1970.) The Civil Rights Commission has made the same point:

Thus the arguments that some now make about the evils of busing would appear less than ingenuous. The plain fact is that every day of every school year 18 million pupils—40 percent of the Nation's public school children—are bused to and from school, and the buses log in the aggregate more than two billion miles—nine billion passenger miles—each year. It also should be understood that the overwhelming majority of school busing has nothing to do with desegregation or achieving racial balance. The trend toward consolidation of schools, for example, particularly in rural areas, requires extensive busing. It causes no

disruption to the educational routines of the children and is treated as normal and sensible.

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In the Commission's view, the emphasis that some put on the issue of busing is misplaced. As most Americans would agree, it is the kind of education that awaits our children at the end of the bus ride that is really important.

(Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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JUN 18 1970

JOHN E. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1713~~ 281

JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION, *et al.*

APPENDIX TO PETITION FOR CERTIORARI
OPINIONS BELOW

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**Opinion and Order dated April 23, 1969 Regarding
Desegregation of Schools of Charlotte and
Mecklenburg County, North Carolina**

PRELIMINARY SUMMARY

The case, originally filed in 1965, is now before the court under the "MOTION FOR FURTHER RELIEF" filed by the plaintiffs on September 6, 1968. The motion seeks greater speed in desegregation of the Charlotte-Mecklenburg schools, and requests elimination of certain other alleged racial inequalities. Evidence was taken at length on March 10, 11, 12, 13, 17 and 26, 1969. The file and the exhibits are about two and one-half feet thick, and have required considerable study. In brief, the results of that study are as follows:

The Charlotte-Mecklenburg schools are not yet desegregated. Approximately 14,000 of the 25,000 Negro students still attend schools that are all black, or very nearly all black, and most of the 24,000 have no white teachers. As a group Negro students score quite low on school achievement tests (the most objective method now in use for measuring educational progress); and the results are not improving under present conditions. The system of assigning pupils by "neighborhoods," with "freedom of choice" for both pupils and faculty, superimposed on an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live—or find they must live—nor on the color of his skin. The neighborhood school concept never *prevented* statutory racial segrega-

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tion; it may not now be validly used to *perpetuate* segregation.

Since this case was last before this court in 1965, the law (or at least the understanding of the law) has changed. School boards are now clearly charged with the affirmative duty to desegregate schools "*now*" by positive measures. The Board is directed to submit by May 15, 1969 a positive plan for faculty desegregation effective in the fall of 1969, and a plan for effective desegregation of pupil population, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Such plan should try to avoid any re-zoning which tends to perpetuate segregated pupil assignment. The Board is free to consider all known ways of desegregation, including bussing (the economics of which might pleasantly surprise the taxpayers); pairing of grades or of schools; enlargement and re-alignment of existing zones; freedom of transfer coupled with free transportation for those who elect to abandon *de facto* segregated schools; and any other methods calculated to establish education as a public program operated according to its own independent standards, and unhampered and uncontrolled by the race of the faculty or pupils or the temporary housing patterns of the community.

THE LAW WHICH GOVERNS

This case vitally affects 83,000 school children of Charlotte and Mecklenburg County—and their families. That means virtually all of us. The School Board and this court are bound by the Constitution as the Supreme Court interprets it. In order that we think in terms of law and human rights instead of in terms of personal likes and preferences, we ought to read about what the Supreme Court has said.

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Before 1954, public education in North Carolina was segregated by law. "Separate but equal" education was acceptable. This *de jure* segregation was outlawed by the two decisions of the Supreme Court in *Brown v. Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion held that racial segregation of schools by law was unconstitutional because racial segregation, even though the physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

"Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard]

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the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."

The second *Brown* case, decided May 31, 1955, directed school boards to do whatever was necessary to carry out the Court's directive as to the pending cases "with all deliberate speed" (349 U. S. 301).

North Carolina's most significant early response to *Brown* was the Pupil Assignment Act of 1955-56,¹ under which local school boards have the sole power to assign pupils to schools, and children are required to attend the schools to which they are assigned.

It is still to this day the local School Board, and not the court, which has the duty to assign pupils and operate the schools, subject to the requirements of the Constitution.

¹ N.C.G.S., § 115-176. Authority to provide for assignment and enrollment of pupils; rules and regulations.—Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this article, *the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete*, and its decision as to the assignment of any child to any school shall be final. . . . No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the *orderly and efficient administration* of the public schools, and *provide for the effective instruction*, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this article. (Emphasis added.)

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It is the court's duty to assess any pupil assignment plan in term of the Constitution, which is still the Supreme law of the land.

Some token desegregation of Charlotte city schools occurred during the late 1950's. In 1961, upon economic and administrative grounds not connected with questions of segregation, the Charlotte City schools and the Mecklenburg County schools were consolidated into one school administrative unit under one nine-member board known as the Charlotte-Mecklenburg Board of Education. By 1964 a few dozen out of more than 20,000 Negro school children were attending schools with white pupils.

This suit was filed on January 19, 1965, by Negro patrons, to seek orders expediting desegregation of the schools. At that time, serious questions existed whether *Brown* required any positive action by school boards to eliminate segregated schools or whether it simply forbade active discrimination. An order was entered in 1965 by the then District Judge in line with the law as then understood, substantially approving the Board's plan for desegregation. The Fourth Circuit Court of Appeals affirmed the order.

Pursuant to the approved plan the Board closed certain all-Negro schools, established school zones, built some new schools, and set up a freedom of choice arrangement for the entire system. The students in a zone surrounding each school are assigned to that school; a period is allotted each spring to request assignment to another school; no reason for transfer need be given; all transfer requests are honored unless the requested schools are full; no transportation is available to implement such transfer.

In appraising the results under this plan in 1969, four years later, we must be guided by some other and more recent things the Supreme Court has said.

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In *Green v. New Kent County School Board*, 391 U. S. 430 at 435 (1968), the Supreme Court held unlawful a county school pupil assignment system which maintained a black school and a white school for the same grades. The Court said:

"It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* 'to effectuate a transition to a racially nondiscriminatory school system.' 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools. See, *e. g.*, *Cooper v. Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. *The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; . . .*"

.

"It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's 'freedom-of-choice' plan to achieve that end.

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". . . In the light of the command of that case, what is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order

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to remedy the established unconstitutional deficiencies of its segregated system. *In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. *School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . .*"

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" . . . 'The time for mere "deliberate speed" has run out,' Griffin v. County School Board, 377 U. S. 218, 234; 'the context in which we must interpret and apply this language [of Brown II] to plans for desegregation has been significantly altered.'"

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" . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . ."

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"We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that *in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself*. As Judge Sobeloff has put it,

"'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, non-racial system.'" *Bowman v. County School Board*, 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion).

"... Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

* * * * *

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" . . . The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

(All emphasis added except for the word "required" in the first quoted paragraph and the word "now" in the fifth quoted paragraph.)

It is obvious that between 1955 and 1968 the meaning and the force of the constitutional guaranty that education if tax paid be equal for all has been intensified. The duty now appears as not simply a negative duty to refrain from active legal racial discrimination, but a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical *apartheid*. It is in this light that the actions of school boards must now be studied.

FINDINGS OF FACT

SOME FACTS ABOUT THE CHARLOTTE-MECKLENBURG
SCHOOL SYSTEM :

a) *General Information.*—The system covers 550 square miles and serves more than 82,000 pupils. It is 43rd in size among the school administrative units of the United States. The county population is over 335,000. The population of Charlotte is now about 270,000. The student population increases at a rate between 2,500 and 3,000 students per year. The schools are 107 in number, including 76 elementary schools (grades 1 through 6), 20 junior high

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schools (grades 7 through 9) and 11 senior high schools (grades 10 through 12). The Board also operates a learning academy, 4 child development centers (kindergartens for the underprivileged) and 3 psycho-educational clinics.

The students on the rolls as of January 1969 include 44,835 elementary students, 20,675 junior high students and 16,690 senior high students. Of these students, about 29% are Negro and about 71% are white. The ratio of black to white of all ages in the county is about one to three.

The 5,880 school employees include 3,553 classroom teachers; 404 other members of the instructional staff including principals, directors and special staff members. These include 60 guidance counselors and 114 librarians. Other employees include 325 secretaries and other clerical employees, 995 cafeteria employees, 357 janitors and maids, 219 maintenance and transportation workers and 27 people assigned to educational television work. The school system is the largest employer in the state's most populous county.

The nine members of the Board of Education are elected three every two years on a non-partisan basis for six-year terms.

Over 18% of the 3,553 classroom teachers have graduate certificates. Some 2,870 or nearly 81% have Class A certificates. Some 852 teachers are men.

Of 1968's 4,095 high school graduates, about 62% or 2,539 entered college. The drop-out rate for the past two years has been approximately 2.3% of the total enrollment of the schools.

The operating budget for the system (not counting construction costs) was nearly \$40,000,000 last year. Average per pupil expense was over \$530. Teachers' salaries range

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from \$5,669 to \$10,230.25. School funds come 58% from the state, 35% from local sources, and 7% from federal funds.

Class size averages approximately 28 students in elementary schools (the first six grades); 26.4 in junior high schools and 29.3 in senior high schools.

All schools have libraries. The total number of books in the libraries is over 806,000, which is nearly 10 books per pupil, with a value estimated at \$2,677,804. (This may be compared with the average of roughly one-half a book per pupil in the schools of the District of Columbia a couple of years ago.) These are not the textbooks which are furnished free by the state for individual use, but are library books for general circulation. Circulation last year was 2,884,252, or an average per pupil of 36 books.

The Board operates the largest food service industry in the state, serving over 70,000 meals a day on a budget of four and one-half million dollars.

Nearly one-fourth of the students (almost 20,000 last year) attend classes at the planetarium in the Children's Nature Museum. This is reportedly more children than attend regular classes at any other planetarium in the country.

Special consultants and teachers are provided in special areas such as art, music, languages, social studies, science, mathematics and physical education. Special teachers are employed to teach classes for the gifted, the mentally retarded and the physically handicapped. Guidance counselors, school psychologists and social workers are available where needed.

Faculty salaries are higher in Mecklenburg County than in most other counties of the state, by virtue of a substantial salary supplement from local taxpayers.

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b) *History and Geography; Background of De Facto Segregation.*—Charlotte (270,000-plus) sits in the center of Mecklenburg County (550 square miles, total population over 335,000). The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and the Southern Railroad run generally through the county and the city from northeast to southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.

By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward—Second Ward—Cherry—Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street, and north of Trade Street, in the northwest part of town. The high priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park—Providence—Sharon—Eastover areas. Charlotte thus had a very high degree of segregation of housing before the first *Brown* decision.

Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the Southern railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900's to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and by white pur-

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chasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. Nearly all industrial land in the city is in the west. The airport in the southwest with its jet air traffic inhibits residential development. Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land. The zoning laws follow the pattern of low cost housing and industry to the west and high cost housing with some business and office developments to the east.

City planning has followed the same pattern.

Tryon Street and the Southern railroad were not built to segregate races. In the last fifteen years grade crossings have been eliminated at great expense at Fourth Street, Trade Street, Twelfth Street and Independence Boulevard; and an elevated half-mile bridge, the Brodie Griffith Skyway, is now being built across the railroad in North Charlotte at a cost of more than three million dollars. The ramparts are being pierced in many spots and inner-city highways now under construction will make communication much simpler.

However, concentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in the low rent areas to the west. This relocation of course involved many ad

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hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision ("freedom of choice"?) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon—railroad area, or on its immediate eastern fringes.

Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly black schools resulted in the northwest and white or nearly all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation.

SOME BOARD ACTIONS FOUND NOT TO BE DISCRIMINATORY

No racial discrimination or inequality is found in the following disputed matters:

1. *The use of federal funds for special aid to the disadvantaged.* The testimony and the exhibits failed to show

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that federal money was used with any discrimination by race or with any improper displacement of local money.

2. *Use of mobile classrooms.* In recent years the system has required the addition of nearly two classrooms per week. Mobile classrooms have been used to provide extra space temporarily to cope with shifts and growth in school population. Mobiles are not inferior in quality and comfort to permanent classrooms, and recent models are superior in many ways to many existing permanent classrooms. Their use and location are matters to be determined by the Board in light of the court's instructions hereafter on the preparation of a new plan for pupil assignment.

3. *The quality of the school buildings and equipment.* The evidence showed the per pupil value of the land and buildings and equipment of the various schools. Average value of these items per pupil for elementary schools was \$861; for junior high schools \$1,229; and for senior high schools \$1,567. Schools described by witnesses as "white" ranged well up and down on both sides of that average figure and schools described by witnesses as "black" showed a similar variation. Several of the oldest and most respected "white" elementary schools in the county (Sharon Road and Steele Creek, for example) have very low per pupil facilities values. One of the newest but still all black high schools (West Charlotte) has one of the highest per pupil facilities values. The highest priced school (Olympic High) is totally desegregated (522 white and 259 black students). No racial discrimination in spending money or providing facilities appears.

4. *Coaching of athletics.* Coaches at the predominantly black schools are usually black. Coaches at the predomi-

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antly white schools are usually white. Several black coaches have been employed at "white" schools. No black coach was shown to have applied and been refused a job. No pattern of discrimination appears in the coaching ranks.

5. *Parent-Teacher Association contributions and activities.* Parents contribute to school projects through voluntary Parent-Teacher Associations. This voluntary parental action is not racial discrimination against children whose parents are less able to make such contributions, and it does not come about through state action.

6. *School fees.* It was contended that the school fee system is discriminatory. For example, at the elementary level, grades 1 through 6, each student is supposed to bring a dollar to school at the beginning of the year to provide some extra learning aids in the form of paper, art materials and the like. In poor communities collection of this fee averages only about 50%, whereas nearly all wealthy children pay all the fees assessed in their schools. This non-payment of school fees by the poor is not a racial discrimination against the poor. The schools where people are poorer have other funds by which this 50¢ per pupil can be made up.

7. *School lunches.* School lunches are provided free to needy students. The court finds that no one has ever knowingly been denied a free lunch on racial grounds if he could not pay for it.

8. *Library books.* Library books of comparable quality and content are available to all students, black and white, in all schools in an average number of nearly ten per pupil.

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9. *Elective courses.* Some elective courses such as German are offered at some but not all of the high schools. They are offered at a school only if enough students express a desire for the course. Not all schools therefore have all elective courses every year. This situation is not the result of discrimination on account of race.

10. *Individual Evaluation of Students.* Individual students are evaluated annually in terms of achievement in particular subjects, and divided into groups for the study of particular subjects in accordance with their achievement. (This is not, truly described, the "track" system which was elaborately criticized by Judge Skelly Wright in his 119-page opinion in *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. D.C., 1967).) Few black students are in the advanced sections and most are in regular or slow sections. Assignments to sections are made by the various schools based not on race but on the achievement of the individual students in a particular subject. There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It is an educational rather than a legal matter to say whether this is done with the students all in one classroom or separated into groups.

11. *Gerrymandering.* Gerrymandering was contended in the 1965 hearing of this case. Perhaps the evidence comes closer to proving it this time. The court is not by this order foreclosing the later assertion of that contention or for that matter any other contention which may be advanced, because it is the court's duty to keep the matter under advisement. However, in view of the court's orders herein which are expected to produce substantial changes in the

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pupil assignment system and a reappraisal of all zoning considerations, it is believed that nothing in particular need be said here about specific school district lines.

SOME COMMENT ON SPECIFIC ISSUES

a) *The Present State of Desegregation.*—Defendant's Exhibit Seven (attached as an appendix to this opinion) shows pupil and faculty population for each school in the system, by races, in March of 1965 and in October of 1968. From this and other evidence the following facts are apparent:

1) *The Rural Schools Are Largely Desegregated.* Of the 32,000 rural children of all twelve grades, some 23,000, black and white, are being hauled by bus to desegregated schools. No rural schools are all-black. The only all-white county schools are four new schools in the south and east portions of the county: Beverly Woods, Devonshire, Idlewild and Lansdowne.

2) *The City Schools are Still Largely Segregated.* A few city schools, Elizabeth (58% Negro); Highland (13% Negro); Plaza Road (19% Negro); Randolph (28% Negro); Sedgefield (19% Negro); Spaugh (18% Negro) and Harding (17% Negro) have a substantial degree of apparently stabilized desegregation. However, most of the fully desegregated city schools are not stable in that situation, but are rapidly moving (through a temporary desegregation) from an all-white to an all-black condition. Dramatic examples are Barringer (84% Negro); Villa Heights (86% Negro); Piedmont (89% Negro); Tryon Hills (50% Negro); Hawthorne Junior High (52% Negro); Lakeview (65% Negro); and apparently Dilworth (39% Negro) and Wilmore (33% Negro).

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3) *More Than Three-Fourths of the Children Attend Schools Which Have One or More Children of the Opposite Race.* In Cornelius (49% Negro), Dilworth (39% Negro), Elizabeth (58% Negro) and a few others, the races are close to being balanced in numbers. However, most schools have only a small handful of the minority race. Illustrations are: Second Ward High School (1,139 black and three white); Midwood (522 white, one black); Lincoln Heights (817 black, two white).

4) *Most Black Students Attend Totally or Almost Totally Segregated Schools.* Out of 24,000 black students:

- 4,780 attend nine all-black elementary schools;
- 3,380 attend six elementary schools which are more than 99% black;
- 2,491 attend three all-black junior high schools;
- 727 attend York Road with only six white fellow junior high students;
- 1,569 high school students attend all-black West Charlotte; and
- 1,139 black Second Ward High School students have only three white classmates.

14,086

In other words, of the 24,000 or so black students, 14,086 of them attend school daily in schools that are all-black unless at York Road they see one of the six white students or at Second Ward they see one of the three white students, who were enrolled there last October.

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5) *Most White Students Attend Largely or Completely Segregated Schools.* Thirteen elementary schools with 8,044 pupils are 100% white; eighteen other elementary schools with a pupil enrollment of 10,651 have only 150 black students. The total number of white elementary students is only 31,545. At the junior high level, 7,641 out of 14,741 white students attend school with only 193 black students in six schools. In the high schools, 12,310 white students attend school with 1,642 blacks, while 2,735 black students at West Charlotte and Second Ward attend school with three white students.

b) *The Opinions of Experts.*—Doctors Larson, Finger and Passy, all from Rhode Island College, of Providence, Rhode Island, testified at length. They submitted a 55-page report which outlines several possible plans for realignment of school zones and for provision of transportation; for pairing schools; for setting up feeder systems; for educational parks; and other approaches towards desegregation. None was as familiar with the local situation as the local Board and school administrators. All drew certain conclusions from the Coleman Report, which is a collection of statistics on performance of school children in certain areas about the country. Some said that kindergarten for all children would help the situation. Some said underprivileged children should start getting public education several years before first grade age. Some said that improving the faculty was important. Available statistics and expert opinion agreed that Negro students as a group do noticeably worse on achievement tests than students generally. The experts agreed that if children are underprivileged and undercultured, their school performance will be generally low. One expert, Dr. Passy, said that socio-

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economic-cultural background is the sole major determinant of school performance. The Abraham Lincoln-Charles Kettering theory of the rise of Americans from poor backgrounds received small support.

One point on which the experts all agree (and the statistics tend to bear them out) is that a racial mix in which black students heavily predominate tends to retard the progress of the whole group, whereas if students are mingled with a clear white majority, such as a 70/30 ratio (approximately the ratio of white to black students in Mecklenburg County), the better students can hold their pace, with substantial improvement for the poorer students.

c) *The "Neighborhood School" Theory.*—Recently, the School Board has followed what it calls the "neighborhood school" theory. Efforts have been made to locate elementary schools in neighborhoods, within walking distance of children. The theory has been cited to account for location and population of junior and senior high schools also.

"Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Chalotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. With a few significant exceptions, such as Olympic High School (about $\frac{1}{3}$ black) and Randolph Road Junior High School (28% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99%+ white); Beverly Woods (100% white); Bruns Avenue (99%+ black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100+ white); Albemarle Road Junior High (93% white).

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Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the county for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood. Parents with children of all ages may be members of two or three separate and widely scattered school "communities." *Putting a school in a particular location is the active force which creates a temporary community of interest among those who at the moment have children in that school.* The parents' community with the school ordinarily ends the day the youngest child graduates.

If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board today, for example, is transporting 23,000 students on school buses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.

When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were not recognized before 1965. It was repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which is quoted above. The neighborhood school theory has no standing to override the Constitution.

d) *Bussing*.—Under North Carolina General Statutes, §115-180, the Board is expressly authorized to operate

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school busses to transport school children. The state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the area presently eligible for bus service. The present cost of school bussing is about \$19 for bus operation plus the cost of the bus which at \$4,500 per bus should not exceed \$20 per pupil a year. In other words, it costs about \$40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about \$540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school buses for all legitimate school purposes. Buses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses cannot be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down.

e) *Faculty Desegregation.*—The Board employs over 2,600 white teachers and over 900 black teachers. New teachers hired last year numbered 700. Technically their contracts are with the Board of Education to teach where assigned. The Board makes no sustained effort to desegregate faculties. The choice where to teach is a matter between the principal and the prospective teacher. The Board assumes white teachers will tend to choose white schools and black teachers black schools.

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The results of this passive selection policy are obvious. Of the thirteen all-black schools in the system serving 8,840 students, only four have any white teachers. Those four have ten white teachers and 161 black teachers for 3,662 students. Few predominantly black schools have any substantial number of white teachers, except a few schools which serve areas rapidly turning from white to black. Eight other schools 99% or more black had only six white teachers among them for 5,246 black and 24 white pupils. Second Ward and West Charlotte High Schools, with 2,700 black students and three white students, have 131 black teachers and only nine white teachers.

All of the white elementary schools have at least one and in a few cases as many as three or four black teachers. The proportions of black teachers in the junior and senior high schools run slightly higher. The system has not operated, however, to produce any substantial teaching of black students by white teachers.

Desegregation of faculties does not depend upon proof of superiority of one group of teachers or students over the other. Whatever the discrimination that may result from a segregated faculty, it will be eliminated only when a child attending any school in the system will face about the same chances of having a black or a white teacher as he would in any other school. Mecklenburg schools pay a sizeable salary supplement. Desegregation is proceeding in other counties and school districts. It can not be assumed and should not be a tacit part of Board policy that white school teachers are opposed to equality of education or that they will refuse to teach in black schools. In fact, white and black teachers are working together in substantial numbers in several schools of this system and there was no evidence at the hearing of any friction or

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difficulty caused by a bi-racial faculty. It is from the teachers that children learn their first glimmerings of the right to equality of opportunity which still constitutes America's chief contribution to modern civilization. The right of all children to equal education is part of that right. It is believed that if the Board takes a stand that requires faculty desegregation and treats all teachers equally in working towards that end, the teachers will participate wholeheartedly.

f) *Metropolitan High School*.—Supported by impressive recommendations from Engelhart, Engelhart & Leggett, educational consultants, the Board has planned and has two million dollars on hand to build Metropolitan High School at or near the location of present Second Ward High School. In addition to being a school for conventional high school work, it is to be a center for vocational training and special courses in music, the creative and performing arts and other special subjects not practical to offer in all the high schools. Second Ward is now a 99%+ black school in the Brooklyn urban renewal area four or five blocks south of the Court House and City Hall. The First Baptist Church and the School Board itself have buildings under way on adjacent or nearby land. This is near the geographical and traffic center of the city and county, one-half a mile from the central business district, a few blocks from Central Piedmont Community College and within easy travel distance of most of the city. The location and proposed purposes appear ideal.

Plaintiffs' attorneys object to Metropolitan High School. Some present school patrons want the school built. The School Board has announced a stoppage of work on that school pending this decision.

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All three groups may be proceeding upon an erroneous assumption—that the school if built will be a black school because the pupil and faculty populations will be governed by freedom of transfer and school zones as presently administered. That assumption should no longer be entertained. Pupils for regular and vocational subjects can travel or be transported to and from this area, in all directions, with greater ease than is true of any other location in the county. The nearest other high schools, Harding, West Charlotte, Garinger, East and Myers Park, form a hollow pentagon six or seven miles on the side surrounding Second Ward. It would be tragic to refrain from building a needed educational facility simply upon the assumption that it has to be an all-black school and therefore either unlawful or unattractive. The School Board is advised to make plans for desegregation of this school along with other schools in the system. With the unrestricted statutory power to assign pupils and provide transportation, the only thing necessary to build Metropolitan High School according to the dreams of its planners is the decision to do so.

g) *The Percentage Racial Mix.*—Counsel for the plaintiffs says that since the ratio of white to black students is about 70/30, the School Board should assign the children on a basis 70% white and 30% black, and bus them to all the schools. This court does not feel that it has the power to make such a specific order. Nevertheless, the Board does have the power to establish a formula and provide transportation; and if this could be done, it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the *New Kent County* language, would be “just schools”; it would make all schools equally “desirable” or “undesirable” de-

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pending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county instead of leaving them resting largely upon the people of the northern, western and southwestern parts of the county; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like surgery be the most conservative solution to the whole problem and the one most likely to produce good education for all at minimum cost. It would simply put the all-white and all-black school people in the same school situation now being experienced by patrons of Cornelius, Davidson, Ranson, Long Creek, Dilworth, Olympic, Huntersville, Pineville, Randolph Road Junior High, Statesville Road, and similar schools. Such action would be supported by the unanimous testimony of all the experts and by inferences from the Coleman Report that although mixing a few whites and a heavy majority of blacks retards the whole group, nevertheless mixing a *substantial majority of whites* and a few blacks helps the blacks to advance without retarding the whites.

h) *A Word About the School Board.*—The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been re-

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viewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others. They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1955 and *Green v. New Kent County* of 1968. The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed are no longer adequate to complete the job which the courts now say must be done "now."

CONCLUSIONS OF LAW

1. Since 1965, the law has moved from an attitude barring discrimination to an attitude requiring active desegregation. The actions of school Boards and district courts must now be judged under *Green v. New Kent County* rather than under the milder lash of *Brown v. Board of Education*. The court has outlined changes which should be made in the activity and theory of the local Board.

2. The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns.

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3. Freedom of transfer as operated in this system does not answer the problems of racial segregation. The evidence shows that the black students as a group have very low incomes. Freedom of transfer without transportation is to such a student often an empty right.

4. The faculties have not been adequately desegregated as directed. This permits and promotes inequality of education.

5. The court does not find any inequality based upon racial motives or reasons in the use of federal funds; the use of mobile classrooms; quality of school buildings and facilities; athletics; PTA activities; school fees; free lunches; books; elective courses; nor in individual evaluation of students. The problem of alleged gerrymandering of district lines need not be covered separately from the general order herein made.

6. There has been substantial desegregation in many areas—mostly the rural areas—of this large and complicated school system. A majority of the black students, however, still attend segregated schools and seldom, if ever, see a white fellow student. Many all-black and all-white schools still remain. The neighborhood school concept and freedom of choice as administered are not furthering desegregation.

7. The School Board has an affirmative duty to promote faculty desegregation and desegregation of pupils, and to deal with the problem of the all-black schools.

8. The School Board is free and encouraged to use school busses or other public transportation and to use

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mobile classrooms as needed to provide equality of educational opportunity.

9. The Board has assets and experience beyond the reach of a judge to deal with all these problems, and should be requested to formulate a plan and time table of positive action.

ORDER

1. All findings or statements of fact in this opinion and order shall be deemed conclusions of law, and all conclusions of law shall be deemed to be findings of fact as necessary in support and furtherance of this order. All competent and relevant evidence in the record has been considered in support of this order.

2. The defendant is directed to submit by May 15, 1969, a plan for the active and complete desegregation of teachers in the Charlotte-Mecklenburg school system, to be effective with the 1969-70 school year. Such plan could approach substantial equality of teaching in all schools by seeking to apportion teachers to each school on substantially the same ratio (about three to one) as the ratio of white teachers and black teachers in the system at large. It is suggested that teachers' preferences not be especially sought and that teachers be assigned as a routine matter for the purpose of accomplishing this equalization of the application of educational manpower and womanpower in the public schools. Such a plan should provide safeguards against racial discrimination in the discharge of any teachers whose jobs might be changed or abolished. Such safeguards should include provisions that if anyone has to be discharged, his qualifications will be weighed against

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those of all personnel in the system rather than simply against those in the capacity in which he has been working; no teacher should be dismissed or demoted or denied employment or promotion because of race or color. In other words, the Board will be expected to see to it that teachers displaced by virtue of this order will not be discriminated against on account of race.

3. The defendant is directed to submit by May 15, 1969, a plan and a time table for the active desegregation of the pupils, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Freedom of choice and zoning may be used in such a plan provided they promote rather than defeat desegregation. If freedom of choice is retained in such plan, it should include provision for transportation free for any student who requests transfer out of a school where his race is in the majority, and to any school where his race is in the minority, and a means of insuring that all students have full and timely knowledge of the availability of such transportation.

4. In formulating its plan the Board is, of course, free to use all of its own resources and any or all of the numerous methods which have been advanced, including pairing of grades and of schools; feeding elementary into junior high and into senior high; combinations of zone and free choice where each method proceeds logically towards eliminating segregation; and bussing or other transportation. The Board may also consider setting up larger consolidated school units freely crossing city-county lines to serve larger areas. There is no magic in existing school zone lines nor in the present size of any school. The Board is encouraged to get such aid as may be available from state and federal agencies including the offices

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of the Department of Health, Education and Welfare. The court does not direct a treaty with the Department, but does suggest that since its employees are in the business of dealing with these problems, they have a store of technical assets and manpower and information which could be useful in the Board's making any particular judgment or analysis.

5. The plan should be the plan of the Board for the effective operation of the schools in a desegregated atmosphere, removed to the greatest extent possible from entanglement with emotions, neighborhood problems, real estate values and pride. The court's task has not been easy, but it is fully realized that the task facing the Board is far more difficult and will require a conspicuous degree of further public service by the Board's members.

This the 23rd day of April, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

APPENDIX

Page 1

The Charlotte-Mecklenburg Schools

Research Report 2-'69

SUMMATION OF DEGREE OF INTEGRATION 1965 (MARCH) AND 1968-69 (OCT. 1,

For Pupils

Professional Staff

<u>Schools Having Integration</u>																	
I.	For Pupils	<u>1965</u>		<u>1968</u>		For Staff	<u>1965</u>		<u>1968</u>								
		1 N + 22 W		16 N + 68 W			3 N + 0 W		16 N + 82 W								
		= 23 of 109 or 21%		= 84 of 112 or 75%			= 3 of 109 or 3%		= 98 of 112 or 87½%								
<hr/>																	
II																	
A.	N	<u>1965</u>		W	N	<u>1968</u>		W	N	<u>1965</u>		W	N	<u>1968</u>		W	
	Number in Minority Race (integrated)																
	Pupils	9W	476N			1192W	6704N			5.7W	QN			131W	208N		
B.	Number in Majority Race (integrated)																
	Pupils	343N	16,446W			8697N	47,356W			143.3N	+0W			374N	2575W		
	<hr/>																
Total Involved by Integration																	
Predominantly <u>Negro Schools</u>	- - Pupils																
	352		9889		<u>Staff</u>		149		505								
	<hr/>																
Predominantly <u>White Schools</u>	- - Pupils																
	16,922		54,060		<u>Staff</u>		0		2783								
	<hr/>																
Total	- - Pupils																
	17,274		63,949		<u>Staff</u>		149		3288								
	or		or		or		or		or								
24% of		77% of		5% of		91% of											
72,336		83,111		3140 incl.		3613 assigned											
Enrolled				part assignments in schools		at one definite school											

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The Charlotte-Mecklenburg Schools

RACIAL DISTRIBUTION OF PUPILS AND PROFESSIONAL STAFF
1965 (March) and 1968-69 (Oct. 1, '68)

Grade	No. School	1965 Pupils		No. School	1968 Pupils		Professional Staff			
		N	W		N	W	1965 N	W	1968 N	W
1-6	72	9,364	27,696	76-	13,290	31,545	377+	1161½	478	138
7-9	17	2,475	11,804	21	5,934	14,741	111-	533	228	70
10-12	8	1,625	10,677	11	4,377	12,313	65	479½	178	60
	97	13,464	50,177	108-	23,601	58,599	553½	2184	884	265
Other	12	6,877	1,818	4+	26,776	72,200	323½	79	23	1
: Kgn. + Trainable										
1-4	1	360					15½			
1-7	2	431	207				17	9½		
1-9	3	729	1611				32	68		
5-9	1	505					25½			
1-12	3	2400					113½			
7-12	2	2452					120	1½		
Total	109	20,341	51,995	112	24,241	58,870	877	2263	907	27
		↑	↑		↑	↑				
		72,336	77,777		83,111	76,777				
		26,177	77,777		26,177	76,777				
							Include		Not Include	
							Part-time		Part-time	

Among teachers assigned
more than one school

APPENDIX

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
	N	%	W	N	%	W (other)	N	%	W	N	%	W (other)
Elementary	N	%	W	N	%	W (other)	N	%	W	N	%	W (other)
Bemarle Rd.				4	1%	499				6	32%	13
Alexander Street	342	100%		257	100%		14.1	100%		11	100%	
Lenbrook		0%	69%	50	10%	452		0%	22.9	2	10%	18
Whaley Park		0%	67%	25	3%	699		0%	28.2	1	3%	28
Lin		0%	60%	668	84%	131		0%	24.8	13	42%	18
Erringer		0%	102%	119	15%	685		0%	39.6	2	6%	32
Erryhill	343	97%	9	223	99%	3	17.6	100%		11	100%	
Whithune					0%	286				1	9%	12
Everly Woods	434	100%					17.2	100%				
Edleville				619	100%	2	32.1	100%		25	100%	
Illingsville	729	100%		8	1%	640		0%	23.9	3	12%	22
Rianwood	2	0%	582	740	99%	4		0%	18.8	26	93%	2
Runs		0%	445	2	0%	491		0%	9.6	1	5%	21
Antilly		0%	207	58	20%	225		0%	16.1	1	5%	21
Dear Creek		0%	375	72	13%	490		0%	11.3	7	33%	14
Collinswood		0%	241	239	49%	252		0%	25.0	1	5%	21
Ornelius		0%	631	11	2%	567	5.0	100%				
Stswold	97	100%		101	35%	186		0%	7.8	1	8%	11
Pestdale		0%	178									
Davidson				705	100%		34.3	100%		29	100%	
erie Davis	808	100%		165	18%	728		0%	35.4	3	9%	32
erita	6	1%	892		0%	889		0%	19.5	4	10%	37
evonshire	2	0%	474	223	39%	355		0%	23.8	4	15%	22
ilworth	100	20%	401	800	100%		28.2	100%		32	100%	
ouble Oaks	703	100%										
uid Hills	520	100%		504	99%	3	20.7	100%		20	100%	
stover		0%	704	49	3%	580		0%	27.1	1	4%	24
Elizabeth	5	1%	448	270	58%	194		0%	22.9	2	9%	21
oderly Park		0%	368	2	1%	374		0%	14.9	1	6%	15
airview	702	100%		363	100%		28.0	100%		19	100%	

36a

1-12 1-85	First Ward	473 100%	749 100%	22.8 100%	30
	J. H. Gunn	696 100%		33.6 100%	
	Hickory Grove	0% 530	80 13% 531	0% 21.7	1
	Hidden Valley		0% 977		2
	Highland	2 1% 273	47 13% 324	0% 14.0	1

* Does not include staff assigned to more than one school per HEW request.

% N is nearest whole per cent that N is of total

APPENDIX

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff		
	N	% N	W	N	% N	W (other)	N	% N	W
Elementary	↓			↓			↓		
Hoskins		0% 342		18	6% 261			0% 14.7	2
Huntersville		0% 553		162	22% 560			0% 22.9	2
Huntingtowne Farms		0% 358		7	1% 695			0% 15.1	1
Idlewild		0% 592		2	0% 521			0% 23.9	1
1-4 1-65 Amay James	360	100%		477	100%	1	15.5	100%	19
1-65 Ade Jenkins	431	100%					17.0	100%	
Lakeview		0% 400		269	15% 147			0% 18.5	14
Lansdowne		0% 633			0% 758			0% 23.9	1
Lincoln Heights	783	100%		817	100%	2	29.1	100%	30
Long Creek		0% 423		250	33% 466			0% 17.6	2
1-65 Matthews		0% 937		(1-6) 93	11% 742			0% 39.7	1
Merry Oaks		0% 538			0% 469			0% 21.9	1
Midwood		0% 560		1	0% 522			0% 24.9	2
Montclair		0% 720			0% 722			0% 29.1	1
Morgan	305	100%					14.9	100%	

37a

Myers Park		0%575	23	4%543	0%24.9	1	4%23
Myers Street	820	100%			32.2	100%	
Nations Ford		0%513	63	10%585	0%21.6	1	4%25
Newell		0%463	73	15%423	0%18.3	1	5%18
Oakdale		0%402	72	13%480	0%17.2	1	5%21
Oakhurst		0%548	2	0%615	0%22.8	1	4%23
Oaklawn	666	100%	650	100%	26.0	100%	25
Olde Providence			10	2%134		1	6%17
Park Road		0%583		0%551	0%22.7	1	5%21
Paw Creek		0%793	63	7%861	0%30.3	1	3%31
Pineville		0%364	168	32%363	0%16.2	1	5%21
Pinewood		0%719		0%707	0%28.1	1	4%26
Plaza Road		0%400	99	19%409	0%17.7	1	5%21
Rama Road		0%442	2	0%777	0%18.7	2	7%27
Sedgefield	3	1%526	7	1%545	0%21.8	2	7%20
Plato Price	505	100%			25.4	100%	
Selwyn		0%531	5	1%598	0%21.9	1	4%22
Seversville	96	3%229			0%14.8		
Shamrock Gardens		0%536		0%539	0%21.9	1	5%20
Sharon		0%591		0%519	0%22.9	1	5%20

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff					
							1965			1968-69*		
	N	%	W	N	%	W	N	%	W	N	%	W
Elementary		N			N	(other)		N			N	(other)
Starmount		0%481		25	3%	713		0%20.9		1	3%	28
Statesville Road		0%650		295	36%	534		0%25.9		3	9%	29
Steele Creek		0%222		12	2%	531		0%10.7		1	5%	20
Sterling	699	100%					33.9	100%				
Thomasboro		0%885			0%705			0%34.3		2	7%	25
Torrence-Lytle	1005	100%					45.1	100%				
Tryon Hills		0%324		241	50%	245		0%15.0		1	5%	20
Tuckasegee		0%631		61	10%	553		0%23.9		1	4%	23
University Park	700	100%		777	100%		25.8	100%		30	91%	1
Zeb Vance	465	100%		257	100%		19.5	100%		11	100%	

38a

Villa Heights	23	4% 594	796	9% 126	0% 28.3	23	62% 14
Wesley Heights	214	100%			8.3	197% 2.2	
Westerly Hills				0% 569			1
Wilmore	6	2% 323	145	33% 293	0% 15.4	8	40% 12
Windsor Park	1	0% 679	2	0% 737	0% 25.8	1	7% 27
Winterfield		0% 455		0% 689	0% 18.7	1	4% 26
Woodland	360	100%	-		14.8	100%	
Woodlawn		0% 283			0% 14.0		
Isabella Wyche	383	100%	222	100%	18.6	100%	12

Child Development (Kgn.)

Davidson, Center #1	83	41% 117	3	30% 7
Pinaville, Center #2	166	92% 37	2	30% 8
Seaversville, Center #3	174	97% 26	8	80% 1
Morgan, Center #4	188	97% 6	8	80% 1

APPENDIX

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff				
	N	% N	W	N	% N (other)	W	1965 N	% N	W	1968-69 * N (other)	
Junior High											
Albemarle Road				66	7%	881				4	9% 43
Alexander		0%	577	347	31%	755		0%	28.9	6	12% 44
Cochrane		0%	872	76	5%	1444		0%	35.4	6	10% 56
Coulwood	3	1%	574	119	14%	727		0%	27.1	4	17% 34
Eastway		0%	1046	3	0%	1364		0%	43.2	3	5% 55
Alex. Graham		0%	1048	8	1%	1084		0%	43.8	4	9% 43
Hawthorne	25	4%	670	492	52%	447		0%	33.9	12	27% 33
Irwin Ave.	785	100%		666	100%		42.7	100%		32	97% 1
McClintock		0%	1273	46	4%	1228		0%	51.5	2	4% 49
Northwest	773	100%		932	100%		33.7	100%		39	100%

39a

Piedmont	121	29% 291	428	99% 53	0% 26.8	13	52% 12
Quail Hollow		0% 766	171	12% 1261	0% 35.2	3	5% 61
Randolph			272	28% 711		2	5% 38
Ransom	9	1% 658	253	30% 586	0% 30.0	6	16% 31
Sedgefield	6	1% 920	189	19% 802	0% 40.5	5	11% 39
Smith		0% 1115		0% 1389	0% 48.6	3	5% 57
Spaugh	1	0% 930	186	1% 871	0% 42.5	6	12% 43
Williams	752	100%	893	100%	34.9 100%	37	100%
Wilson		0% 1064	60	5% 1132	0% 45.6	4	8% 45
York Rd.	(7-12) 1041	100%	727	99% 6	49.9 100%	32	99% 1

Learning Academy - 7th & 8th grades
counted in JM, above,

5 19% 21

APPENDIX

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff		
	N	%	W	N	%	W	1965	1968-69*	
Senior High	N	N		N	N	(other)	N	N	W
East Mecklenburg		0% 1782		155	8% 1739		0% 79.2	6	7% 85
Garinger	2	0% 2266		202	9% 2157		0% 100.0	6	6% 102
Harding		0% 1002		169	1% 814		0% 48.0	4	3% 49
Independence				92	9% 962			6	9% 59
Myers Park	31	2% 1772		158	8% 1855		0% 76.7	6	6% 87
North Mecklenburg	1	0% 1155		410	2% 1109		0% 51.8	6	9% 63
Olympic				259	3% 522			5	11% 39
Second Ward	1411	100%		1139	100%	3	70.0 98% 1.5	57	95% 3
South Mecklenburg	30	2% 1430		106	6% 1812		0% 72.0	4	5% 78
West Charlotte	1560	100%		1569	100%		65.0 97% 2.0	74	93% 6
West Mecklenburg	1	0% 1270		118	3% 1340		0% 61.4	4	5% 73

Order dated June 3, 1969

The defendants have filed a proposed plan of action pursuant to the court order of April 23, 1969. The plaintiffs have filed a motion requesting restraint on further school construction until the school board has dealt satisfactorily with the segregation question. A further hearing is indicated. The court has two weeks of criminal court starting June 2; and Monday, June 16, 1969 is the earliest predictable time that a hearing could be conducted.

All parties are therefore notified that a hearing will be held in the United States Court House in Charlotte starting on Monday, June 16, 1969, at 10:00 a.m. All parties are requested to be present.

Under the law the burden is upon the school board to come forward with a plan which "promises realistically to work now" to eliminate segregation in the Charlotte-Mecklenburg schools. The obligation of the court under the law is "to assess the effectiveness of a proposed plan in achieving desegregation." Evidence will be received from all parties on these general subjects.

Without limiting any party in the scope and type of relevant evidence which he may wish to produce, the court directs the parties to come forward with exhibits, statistics, records, and other information so that the court will be in adequate position to make findings upon the following subjects, among others:

1. What has been accomplished, by June 16, toward achieving the duty which the defendants have accepted of "achieving substantial faculty desegregation," and what the plan proposed by the defendants may be expected to accomplish further along that line by September, 1969.

2. What school zones may fairly be said to have been gerrymandered (either by control of their boundary lines

Order Dated June 3, 1969

or by control of their student capacity or both) so as to fit a particular pocket or community of all- or nearly all-black or all- or nearly all-white students; and what could be done to reduce or eliminate segregation in those zones.

3. What progress if any toward desegregation of pupils may reasonably and predictably be expected by September, 1969, from the pupil plan presented by the defendants.

4. What effect if any the pupil plan may be expected to have upon the present large group of all-black or 99%+ black schools, and upon the more than 14,000 children who still attend them.

5. Why students allowed to transfer from one zone to another to avoid racial discrimination should be penalized by being required to wait a year before taking part in varsity athletics, as the proposed pupil plan requires, which self-admitted "penalty" is lifted if they return to the zone originally assigned by the defendants.

6. The actual meaning of the "free transfer" plan—the numerical extent to which the plan requires that students wishing to transfer and being supplied transportation to transfer will actually find space in the schools of choice if they exercise their option to transfer. This is not a trick question but one directed to the ambiguity of the plan and the conflicts in the language used in the plan. Clarification is requested.

7. What steps will be followed to insure that the transfer-with-transportation choice is actually communicated personally to children who may be entitled to the choice, and to their parents, and affirmatively accepted or rejected by them.

Order Dated June 3, 1969

8. Statistics on school population by race in the system for the years since consolidation and similar statistics for the separate county and city units from 1954 until consolidation.

9. The facts about school bussing operations of the Charlotte-Mecklenburg school system, including such records as already exist on bus routes, year by year, since 1961, including where the busses get the pupils and where they take them, and the races of the pupils transported.

10. The pupil attendance zones or school zones, year by year, for all years since 1954.

11. What the pending school construction programs will do in terms of creating pupil accommodations, and whether the programs will tend to perpetuate or to alleviate segregation in the schools.

12. Why decision on the construction and purposes of Metropolitan High School should not be postponed until after a final court ruling, appellate or otherwise, has been rendered, so that the decision on the educational questions can be made in a quieter and non-racial atmosphere. Also, why the defendants should not retain any land or control over any land they may now have, pending such decision.

13. Why no action has been taken by the defendants on the various possible methods for further reduction of segregation such as re-examination of zones, enlargement or combination of school zones, reorganizing the existing 23,000 pupil bus system, pairing of schools, consultation with the Department of Health, Education and Welfare, and other possible methods.

Order Dated June 3, 1969

14. Scholastic aptitude tests and achievement tests and intelligence tests for all grades for which such data are available in all schools in the county and city since 1954.

15. What concrete and specific steps, if any, plaintiffs would have the defendants adopt in order to comply with the Constitution. The court is not interested in a restatement of the previous demand of plaintiffs that all the schools in the system be populated on a 70/30 basis, because as previously stated the court does not have the power to make such an order and the defendants have served notice that they will not undertake such an assignment themselves. What is desired is some tough and detailed thinking and planning as to detailed methods to reduce and promptly eliminate segregation in the Charlotte-Mecklenburg schools.

The above questions and requests, insofar as they call for facts and figures, call for the production—not the creation—of the desired information. Counsel are requested to advise the court immediately if the production of already existing records does not provide any of the statistical information mentioned above. It is not the intention of the court to put the parties to work creating new charts nor re-assembling existing statistics, but rather to make available existing information.

This the 3rd day of June, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order Adding Additional Parties dated June 3, 1969

Several changes in the personnel of the defendant school board have taken place since this suit was instituted. In order that all parties may be fully before the court and that there be no avoidable technical irregularity.

It Is ORDERED that all the present members of the Charlotte-Mecklenburg Board of Education be and they are hereby made formal parties to this action; that copies of the MOTION FOR FURTHER RELIEF filed September 6, 1968 be served upon them and that there also be served upon them copies of all orders and motions that have been filed since that time.

Service of these motions and orders (including this order making new parties and the order of this same date regarding the further hearing of June 16, 1969) should be made by the United States Marshal. The members of the school board and their addresses are:

Mr. William E. Poe, Chairman
2101 Coniston Place (Home)
1014 Law Building (Office)
Charlotte, North Carolina

Mr. Henderson Belk
529 Hempstead Place
(Home)
308 East Fifth Street
(Office)
Charlotte, North Carolina

Rev. Coleman W. Kerry, Jr.
1022 Kohler Avenue
Charlotte, North Carolina

Mr. Dan Hood
Route 4
Matthews, North Carolina

Mrs. Julia Maulden
Box 6
Davidson, North Carolina

Order Adding Additional Parties Dated June 3, 1969

Mr. Ben F. Huntley
Box 128
8301 Pineville Road
(Office)
Pineville, North Carolina

Mr. Sam S. McNinch, III
2914 Hampton Avenue
(Home)
4037 E. Independence Blvd.
(Office)
Charlotte, North Carolina

Mrs. Betsey Kelly
3501 Mountainbrook Road
Charlotte, North Carolina

Dr. Carlton G. Watkins
1223 Marlwood Terrace
(Home)
1630 Mockingbird Lane
(Office)
Charlotte, North Carolina

This the 3rd day of June, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Opinion and Order dated June 20, 1969

Pursuant to notice dated June 4, 1969, a hearing was held in Charlotte on June 16, 17 and 18, 1969, on various matters including (1) the motion of the individual defendants for dismissal; (2) the motion of the plaintiffs for contempt citations against the individual defendants; (3) the proposals offered by the defendants pursuant to the April 23, 1969 order as a plan for desegregating the Charlotte-Mecklenburg schools; and (4) the motion of the plaintiffs for an order restraining further school construction until the segregation issue has been satisfactorily resolved.

I.

THE MOTION OF THE SCHOOL BOARD MEMBERS TO DISMISS.

The motion of the individual defendants, members of the school board, to dismiss was and is denied. This is a suit under the Civil Rights Act involving questions of equal protection of laws and racial discrimination and segregation in the public schools. The individual defendants are proper parties and their presence is appropriate and desirable.

II.

THE MOTION FOR A CONTEMPT CITATION.

The motion of the plaintiffs that the individual defendants be found in contempt of the court is on this record denied. The board is badly divided and many of its recent decisions appear to be made by a five to four vote. Supreme Court judges now and then make five to four decisions. (Fortunately their votes in all major school segregation cases appear to have been unanimous.) The members of

Opinion and Order dated June 20, 1969

the board have had uncomplimentary things to say about each other and about the court, and many of them obviously disagree with the legality and propriety of the order of the court; but these latter sentiments may be regarded by the court as evidence of disagreement with rather than contempt for the court who is himself not far removed from active participation in the time-honored custom of criticizing a judge who has ruled against him. Moreover, on an issue of such significance, the amount of foot-dragging which has taken place, up to now at least, should not be considered as contempt of court.

III.

THE PLAN OF THE DEFENDANTS.

1. *The history of the plan.*—The order of this court directing a further plan for desegregation was entered April 23, 1969. Within hours, various of the defendants expressed sharp views pro and con. The board met on April 28, 1969, and for the first time briefly discussed the order. By a five to four margin, apparently, they decided informally not to try to appeal immediately, upon the basis that the right of appeal from the order to prepare a plan was doubtful. The school superintendent was instructed to prepare a desegregation plan. No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal. In a county and city criss-

Opinion and Order dated June 30, 1969

crossed by school bus routes for 23,000 pupils, more than twenty thousand citizens, mostly from affluent suburbia, many of whose children undoubtedly go to school on school busses, signed petitions against "involuntary" bussing of students. The frenzy of parents received a ready forum in televised meetings of the board. The staff were never directed to do any serious work on re-drawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other possible methods of making real progress towards desegregation.

The superintendent revealed the general terms of his plan within a few days and later presented it formally on May 8, 1969. It provided for full faculty desegregation in 1969, which the superintendent said he considered feasible. It provided moderate changes in the pupil assignment plans; and it contemplated future study of the other methods of desegregation suggested in the April 23, 1969 order.

The board then met, struck out virtually all the effective provisions of the superintendent's plan, and asked for more time from the court, which had previously been promised.

The board's committee on buildings and sites, newly re-constituted, met and voted to cancel the long standing plans for Metropolitan High School, and voted to build it as only a specialty and vocational school without including the comprehensive high school which consultants and experts, including the school board's staff and superintendent, had recommended and still recommend. No new facts except the order of court had developed to account for the sudden change of plan. The stated reason for the change was that a general high school in Second Ward (though not a vocational or technical school) would necessarily be black and

Opinion and Order dated June 20, 1969

therefore should not be built. [The Second Ward school site, where Metropolitan is scheduled to be built, is squarely in the center of the city's population; is a scant four blocks from the south boundary of its zone; and is apparently the easiest high school in town to desegregate; its boundaries could easily be re-drawn by extending its southern boundary (Morehead Street) and its eastern boundary (Queens Road) a few blocks.]

Thereafter, on May 28, 1969, the plan was filed. Volunteers were requested among the teachers; pupil transfer requests were set out; and data on the workings of the plan began to accumulate.

During the early debate over the court order, events transpired between the chairman and the superintendent which were thought by an assistant superintendent and others to threaten the superintendent's job if he pushed for compliance with the court's order. A few days before this hearing, the board committee on personnel declined to accept the superintendent's recommendation that Robert Davis, a Negro, be appointed principal of one of the schools. This was the first time such a recommendation had not been accepted. After some debate, the decision was postponed, with the superintendent requested to bring in alternate names. The publicly stated reasons for not approving the appointment were that Davis, whose training, experience and qualifications were unquestioned, is a plaintiff in this case and a member of the Negro Classroom Teachers Association and has spoken out publicly in favor of compliance with this court's order—including one television appearance before the board itself to which the board had invited interested citizens. Davis, according to the press, was eventually confirmed for the job on June 19, 1969, but only after a "loyalty oath" had been exacted. The

Opinion and Order dated June 20, 1969

effect of the so-called "job threat" and the Davis incident, following the public statements of board members, is a clear message: School employees voice opinion contrary to the board majority on desegregation at personal risk.

2. *The June 16, 1969 hearing.*—The defendants, under the law, had the burden of showing that their plan would desegregate the schools. To carry that burden they introduced a short written brief and some statistical data and rested their case without live testimony. The plaintiffs called all members of the school board and the Rhode Island expert, Dr. Finger, who testified at the March hearing, and a few other witnesses. There was some rebuttal from the board.

3. *Findings as to General Board Policy.*—

a) The board does not admit nor claim that it has any positive duty to promote desegregation.

b) School sites and school improvements have not been selected nor planned to promote desegregation and the board admits no such duty.

c) Board policy is that the Constitution is satisfied when they locate schools where children are and provide "freedom of transfer" for those who want to change schools.

d) Despite its inclusion in the "Plan," the decision of the board about Metropolitan High School is not really a final one; several members consider the issue in doubt, and the full board has not formally considered it.

Opinion and Order dated June 20, 1969

4. *The Pupil Assignment Plan.*—The plan now proposed is the plan previously found racially discriminatory, with the addition of one element—the provision of transportation for children electing to transfer out of schools where their races are in a majority to schools where they will be in a minority. Such provision of transportation is approved.

Another provision of the plan makes high school athletes who transfer from one school to another ineligible for varsity or junior varsity athletics until they have been a year in the new school. For the current year, with the returns almost complete, only two white students out of some 59,000 have elected to transfer from white schools to black schools. Some 330 black students out of some 24,000 have elected to transfer to white schools. Only the tiniest handful of white students have ever in any year asked to transfer to black schools. The effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who show no desire for such transfers. The defendants' superintendent considers athletics an important feature of education. This penalty provision is racially discriminatory. The board is directed not to enforce it any more and to give adequate individual notice to all rising 10th, 11th and 12th grade students that they may reconsider their previous choice of schools in light of the removal of the penalty.

Freedom of transfer increases rather than decreases segregation. The school superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. The use of a free transfer provision is a decision for the board; it may make desegregation more palatable to the community at large; it is not, per se,

Opinion and Order dated June 20, 1969

if the schools are desegregated, unconstitutional. Nevertheless, *desegregation of schools is something that has to be accomplished independent of freedom of transfer*. This is a fact which because of the complexity of the statistics has only become clear to the court since the previous order was issued.

5. *The Faculty Assignment Plan*.—The plan originally proposed by the superintendent would have desegregated the faculty as a routine matter in 1969. The plan proposed by the board however is not materially different from the already existing plan. It continues to rely upon voluntary transfers and it contemplates affirmative assignment of teachers to black schools only late in the day after a hopeful routine of filling vacancies (some of which do not exist) has been followed. The board has not taken a position of leadership with the teachers and the results are apparent. Only 28 out of 2,700 white teachers, and only 38 out of 900 black teachers, had on June 18, 1969 indicated a willingness to transfer to schools of the opposite race. Testimony of the board members who comprise the majority of the board suggests that they do not really contemplate substantial faculty desegregation and that they may consider figures of "10%"; or one black teacher to each white school and one white teacher to each black school; or filling vacancies from the opposite race as they arise, to be compliance with the needs of the situation. None of these ideas, of course, amounts to desegregation of the faculty. The evidence submitted by the board does not demonstrate that the faculty plan will work. Several board members said that the plan to assign teachers is not an "idle promise."

All that it takes to make the faculty plan work is timely decision by the board to implement the assignment of teach-

Opinion and Order dated June 20, 1969

ers. Board members are requested in this connection to consider the latest unanimous Supreme Court decision, *United States v. Montgomery County Board of Education* (October Term 1968), Case No. 798, decided June 2, 1969, reversing the Fifth Circuit Court of Appeals and upholding a district court order for faculty desegregation under a mathematical formula. Ruling on the faculty plan will therefore be deferred until after August 4, 1969, by which time the board is directed to file a report stating in detail what the plan has done and what the status of faculty assignments then is. The court considers the faculty assignment plan to be important and agrees with the superintendent of schools that immediate desegregation of the faculty is feasible. This is a substantial improvement which is available without arousing ghosts of "bussing," "neighborhood schools," or additional expense.

IV.

GERRYMANDERING

This issue was passed over in the previous opinion upon the belief which the court still entertains that the defendants, as a part of an overall desegregation plan, will eliminate or correct all school zones which were created or exist to enclose black or white groups of pupils or whose population is controlled for purposes of segregation. However, it may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

Opinion and Order dated June 20, 1969

zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy.

* * * * *

The findings of fact in the April 23, 1969 order and all statements in this opinion are treated as findings of fact in support of the order. All of the evidence in the case is considered in support of the order.

ORDER

Based upon the evidence and upon the foregoing findings of fact the orders of the court are as follows:

1. The motion of the individual defendants to dismiss is denied.
2. No citations for contempt are made.
3. Decision on the faculty assignment plan is deferred pending receipt of a progress report from the board on or before August 4, 1969.
4. The one year penalty on transferring high school athletes is disapproved with direction as above for appropriate personal communication to rising high school students.
5. The provision of transportation for students transferring from a majority to a minority situation is approved.

Opinion and Order dated June 20, 1969

6. The board is directed to proceed no further with action on Metropolitan High School pending a showing by the board that the school if constructed will be adequately desegregated and a finding by the court to that effect. This is based upon the previous findings that the board's decision on Metropolitan was unduly affected by racial considerations and that the board has not accepted its affirmative legal duty to build school facilities so as to promote desegregation.

7. As to the other building projects referred to in the motion for restraint on construction, the burden remains upon the defendants to show that these programs will produce desegregation. The written material tendered by the defendants on this subject is lengthy, and does not appear to sustain that burden. However, decision on the request for injunction against projects other than Metropolitan will be delayed pending further study of the evidence.

8. It is further ordered that the defendants proceed to prepare and submit by August 4, 1969, a positive plan for desegregation of the pupils of the Charlotte-Mecklenburg school system, as originally directed on April 23, 1969. A witness, Dr. Finger, described in detail a plan for desegregation by changing certain school zone lines and merging certain schools into districts and using certain schools as feeders for others. This plan shows a high degree of realism in that it minimizes the necessity for long-range transportation and takes substantial advantage of location and makeup of populations. Local school administration consider such a plan feasible. The local school administrative staff are also better equipped than Dr.

Opinion and Order dated June 20, 1969

Finger, a "visiting fireman," to work out and put into effect a plan of this sort. It is believed that if the resources of the board can be directed as originally ordered toward preparing a Charlotte-Mecklenburg plan for the Charlotte-Mecklenburg schools, desegregation of both faculties and students may be accomplished in an orderly fashion. Counsel are requested to notify the court promptly if more time beyond August 4, 1969 is needed.

This is the 20th day of June, 1969.

JAMES B. McMILLAN
James B. McMillan
United States District Judge

**Supplemental Findings of Fact in Connection With the
Order of June 20, 1969 (Dated June 24, 1969)**

The relatively complete extent of the segregation of the schools in this system is demonstrated by study of the defendants' statistics which were attached to and included in the original opinion of this court of April 23, 1969. There are about 24,000 black students in the county. As near as can be estimated, approximately 21,000 of these attend schools within the City of Charlotte. When *Brown v. Board of Education* was decided in 1954, the City of Charlotte had less than 7,500 black students. Today within the City of Charlotte 14,086 black students attend 21 schools which are totally black or more than 99% black. An additional 2,895 black students attend six schools whose black population is between 50% and 86% black. These schools are all rapidly moving to a totally or near-totally black condition under present policies. When all this is put together and understood, it becomes clear that of the City's 21,000 or so black students, nearly 17,000 of them according to the figures, and certainly more than 17,000 when the population trends are considered, are attending racially identifiable black schools.

This the 24th day of June, 1969.

JAMES B. McMILLAN
James B. McMillan
United States District Judge

Order dated August 15, 1969

PRELIMINARY SUMMARY

Pursuant to this court's June 20, 1969 order, the defendants submitted on July 29, 1969 an amended plan for desegregation of the Charlotte-Mecklenburg schools, including a highly significant policy statement accepting for the first time the Board's affirmative constitutional duty to desegregate students, teachers, principals and staffs "at the earliest possible date." On August 4, 1969, a report was filed in connection with the plan. A hearing was conducted on August 5, 1969. The plan is before the court for approval.

Because the schools must open September 2, and because the Board's plan includes both substantial action and genuine assurance of sustained effort toward prompt compliance with the law of the land, the plan of operation, for 1969-70 only, is approved and as indicated below, the defendants are directed to prepare and file by November 17, 1969, detailed plans and undertakings for completion of the job of desegregating the schools effective in September, 1970.

THE AMENDED PLAN—AND ITS RECEPTION

The plan proposes, among other things, to close seven old all-black inner-city schools and to assign their 3,000 students to various outlying schools, now predominantly white, mostly in high rent districts.

This technique of school closing and reassignment has been employed in dozens of school districts to promote school desegregation. It is not original with the local School Board.

The school closing issue has provoked strident protests from black citizens and from others; evidence showed that

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n estimated 19,000 names are listed on a petition denouncing the plan as unfair and discriminatory. The signers add their own brand of protest to that of the 21,000 whites who last May (though protesting their acceptance of the principles of desegregation) raised a "silk-stocking" community outcry against bus transportation except to schools of individual choice. Another 800 white Paw Creek petitioners have joined in protest against a part of the plan under which some 200 fifth and sixth grade pupils would be assigned to re-opened Woodland, a new unused (and formerly black) school. Comment from people who have not studied the evidence tends to ignore the law—the reason this question is before a *court* for decision—and to concentrate on public acceptance or what will make people happy. A correspondent who signs "Puzzled" inquires:

"If the whites don't want it and the blacks don't want it, why do we have to have it?"

The answer is, the Constitution of the United States.

**THE CONSTITUTION—THE LAW OF THE LAND—REQUIRES
DESEGREGATION OF PUBLIC SCHOOLS**

North Carolina reportedly refused to ratify the United States Constitution until the Bill of Rights had been incorporated into it. The Fourteenth Amendment to that constitution, now part of the Bill of Rights, guarantees to all citizens the "equal protection of laws." In *Brown v. Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955), the Supreme Court held that racial segregation in public schools produces inferior education and morale, restricts opportunity for association, and thus violates the equal protection guaranty of the Constitution and is unlawful. In *Green v. New Kent County School Board*, 391

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U. S. 430 (1968), and two other simultaneous unanimous decisions, the Supreme Court held that school boards have the *affirmative duty* to get rid of dual school systems, to eliminate "black schools" and "white schools," and to operate "just schools." The Court said:

"The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*." (Emphasis on the word "*now*" was put in the text by the Supreme Court.)

For years people of this community and all over the south have quoted wistfully the statement in *Briggs v. Elliott* by Judge John J. Parker (who at his death was one of my few remaining heroes) that though the Constitution forbids segregation it does not require integration. Passage of time, and the revelation of conditions which might well have changed Judge Parker's views if he had lived, have left Judge Parker's words as a landmark but no longer a guide. The latest decision on this subject by the Fourth Circuit Court of Appeals (which is the court that first reviews my actions) contains this statement:

"The famous *Briggs v. Elliott* dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration, is now dead." *Hawthorne v. Lunenburg*, Nos. 13,283, 13,284, Fourth Circuit Court of Appeals, July 11, 1969.

"Freedom of choice," as this court has already pointed out, does not legalize a segregated school system. A plan with freedom of choice must be judged by the same standard as a plan without freedom of choice—whether or not the plan desegregates the public schools. The courts are concerned primarily not with the techniques of assigning

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students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools*. The test is pragmatic, not theoretical.

CONTINUED OPERATION OF SEGREGATED PUBLIC
SCHOOLS IS UNLAWFUL

The issue is one of law and order. Unless and until the Constitution is amended it is and will be unlawful to operate segregated public schools. Amending the Constitution takes heavy majorities of voters or lawmakers. It is difficult to imagine any majority of Supreme Court, of Congress or of popular vote in favor of changing the Constitution to say that public school pupils may lawfully be kept in separate schools because they are black. A community bent on "law and order" should expect its school board members to obey the United States Constitution, *and should encourage them in every move they make toward such compliance*. The call for "law and order" in the streets and slums is necessary, but it sounds hollow when it issues from people content with segregated public schools.

The questions is not whether people like desegregated public schools, but what the law requires of those who operate them.

THE DUTY TO OBSERVE THE CONSTITUTION AND DESEGREGATE THE SCHOOLS CANNOT BE REDUCED OR AVOIDED BECAUSE OF SOOTHING SAYINGS FROM OTHER GOVERNMENT OFFICIALS NOR OUTCRIES FROM THOSE WHO WANT THE LAW TO GO AWAY.

The rights and duties of the parties to this suit are in this court for decision according to *law*—not according to HEW guidelines or public clamor. The court and the school board are bound by the Constitution. *So are the legislative and executive branches of government*. No one in Washing-

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ton or Raleigh or local government is above or beyond the Constitution. None have power to change it except by lawful means. None have *or claim* the power to interfere with the courts in cases like this one. The malleable HEW "guidelines" put out by the President's administrator for educational affairs, and dubious inferences from statements of other officials, however highly placed, are irrelevant to the constitutional rights of the parties in this case. Also irrelevant are soothing sayings of the Vice President (who has the duty in this area) to black-tie political audiences, and the not-so-soothing sayings of citizens who erroneously talk as if the school segregation issue were a simple matter of political pressure and short-term public opinion. As for the Attorney General of the United States, he has just filed the biggest desegregation suit of all—*against the whole State of Georgia!* Segregation of children in public schools, whether they be black or white, and regardless of whether they do or don't want to stay apart, is unlawful. As the Supreme Court said in *Brown II*:

"... the vitality of these constitutional principles can not be allowed to yield simply because of disagreement with them."

THE SCHOOL BOARD'S NEW PLAN REPRESENTS SUBSTANTIAL PROGRESS.

Against this background the Board's new plan is reviewed:

1. The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members "at the earliest possible date." It has recognized that where people

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live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*

2. In the second place, by the following actions the Board has demonstrated its acceptance of its stated new policies:

a) The desegregation of faculties and the non-racial reassignment of principals and employees from newly closed schools. In the formerly all-black faculties the Board has dramatically exceeded its goal. It is assumed by the court that this process of faculty desegregation will continue and that the goal for 1970-71 will be that faculties in all schools will approach a ratio under which all schools in the system will have approximately the same proportion of black and white teachers.

b) The closing of seven schools and the reassignment of 3,000 black pupils to schools offering better education.

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c) The reassignment of 1,245 students from several overcrowded primarily black schools to a number of outlying predominantly white schools.

d) The announced re-evaluation of the program of locating and building and improving schools, so that each project or site will produce the "greatest degree of desegregation possible."

e) The Board correctly and constructively concluded that the so-called "anti-bussing law" adopted by the General Assembly of North Carolina on June 24, 1969, does not inhibit the Board in carrying out its constitutional duties and should not hamper the Board in its future actions. Leaving aside its dubious constitutionality (if it really did what its title claims to do) the statute contains an express exception which renders it ineffectual in that it does not prevent "any transfer necessitated by overcrowded conditions or other circumstances which in the sole discretion of the School Board require reassignment."

f) The elimination without objection of the former provision which had the effect of inhibiting transfer rights of black would-be athletes.

g) Quite significantly, the Board calls upon the Planning Board, the Housing Authority, the Redevelopment Commission and upon real estate interests, local government and other interested parties to recognize and share their responsibility for dealing with problems of segregation in the community at large as well as in the school system.

h) The proposals for programs of "compensatory education" of students, and for teacher orientation and

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exchange of activities among black and white students. The court assumes that these somewhat vaguely stated ideas will become implemented with concrete action.

3. *The Seven School Problem.*—The Board plan proposes to close Second Ward High School, Irwin Avenue Junior High School and five inner-city elementary schools (five of which were already marked for abandonment) and to reassign their 3,000 students to outlying white schools. This part of the plan has struck fire from black community leaders and some other critics. Counsel for the plaintiffs contend that it puts an unconstitutional and discriminatory burden upon the black community with no corresponding discomfort to whites. One spokesman for a large group of dissenting and demonstrating black citizens was allowed to express his views at the August 5, 1969 hearing. Threats of boycotts and strikes have been publicized.

This part of the plan is distasteful, because all but 200* of the students being reassigned *en masse* are black. It can legitimately be said and has been eloquently said that this plan is an affront to the dignity and pride of the black citizens. Pride and dignity are important. If pride and dignity were all that are involved, this part of the plan ought to be disapproved. The court, out of forty-year memory of four years of transportation on an unheated Model-T school bus but thirteen miles each way from a distant rural community to high school in a "city" of 4,000, is fully aware how alien and strange are the sensations experienced by a school child who is hauled out of his own community and into a place where the initial welcome is uncertain or cool.

* The 200 students being reassigned from Paw Creek to Woodland are white.

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However, this part of the plan is not compulsory. Students who want to remain in the comfort of their familiar area may elect to attend the Zebulon Vance School instead; alternatives are also provided for the junior high school students.

Moreover, as one of the attorneys remarked at the first hearing in a discussion about reassignments and school busses: "The question is really not one of 'bussing' but whether what the child gets when he gets off of the bus is worth the trouble."

I personally found the better education worth the bus trip.

Despite their undoubted importance, pride and dignity should not control over the Constitution and should not outweigh the prospects for quality education of children. The uncontradicted evidence before the court is that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children. By way of brief illustration a table follows showing the contrasting achievements of sixth grade students in five of the closed schools (Bethune, Fairview, Isabella Wyche, Alexander Street and Zeb Vance) and in five of the schools to which black students are going to be transferred:

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AVERAGE ACHIEVEMENT TEST SCORES

SIXTH GRADE—1968-69

	<i>SP.</i>	<i>LANG.</i>	<i>ACM. (Math)</i>	<i>WM (Word Meaning)</i>
Bethune	45	34	41	41
Ashley Park	61	62	56	58
Fairview	46	38	42	39
Westerly Hills	61	61	52	57
Isabella Wyche	41	34	40	38
Myers Park	80	84	58	73
Alexander Street	45	38	34	40
Shamrock Gardens	57	62	53	56
Web Vance	38	34	39	42
Park Road	71	75	58	66

This alarming contrast in performance is obviously not known to school patrons generally.

It was not fully known to the court before he studied the evidence in the case.

It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.

The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.

Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.

It is painfully apparent that "quality education" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.*

As hopeful relief against this grim picture is the uncontradicted testimony of the three or four experts who

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testified, some for each side, and the very interesting experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.)

Moreover, the Board's announced policy and the uncontradicted testimony of the superintendent show that serious arrangements are being made to welcome, rather than rebuff, the transferees into all school activities. This is something new and important.

No legal authority is cited that the Constitution prohibits transport of consenting black children from an inferior educational environment into a better educational environment for the purpose of complying with the constitutional requirement of equal protection of laws.

The choice of how to do the job of desegregation is for the School Board—not for the court.

The Board has wide discretion in choosing methods; many effective methods are described in the evidence; the court's duty is simply to pass on the legality of the Board's actions. It appears to the court that the improvement in the education of 4,200 school children is the one most obvious result of the Board's plan of action for 1969-70, and that this is more important constitutionally than other considerations which have been advanced.

It is not the intention of this court to endorse or approve any future plan which puts the burden of desegregation primarily upon one race. However, there is not time before September 2, 1969 to do a complete job of reassign-

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ing pupils; the plan is a step toward more complete compliance with the law; the court reluctantly votes in favor of the 4,200 school children and approves the plan on a one-year basis.

THE MAJOR TASK LIES AHEAD THIS FALL

The big job remains to be done. After implementation of the current plan, further large scale faculty transfers will still be necessary. Sixteen years after *Brown v. Board of Education*, some thirteen thousand school children will remain in black or nearly all-black schools. Most white students will remain in substantially all-white schools. The failure of the plan to deal with those problems of course can not be approved. The failure of the plan to include a time table for the performance of specific elements of the program of course can not be approved, *Felder, et al. v. Harnett County Board of Education, et al.*, 409 F. 2d 1070 (4th Cir., 1969). These matters must be covered by specific instructions to the Board.

All findings of fact in the previous orders of April 23, 1969, and June 20, 1969, and the supplemental findings of June 24, 1969, are incorporated herein to the extent that they are consistent with the findings, conclusions and orders herein reached and given. All evidence at all hearings is considered in reaching these conclusions.

ORDER

1. The policy statement of the Board is approved.
2. The faculty desegregation program is approved.
3. The plan to desegregate pupils by closing seven all-black schools and assigning their pupils to outlying white

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schools is approved only (1) with great reluctance, (2) as a one-year, temporary arrangement, and (3) with the distinct reservation that "one-way bussing" plans for the years after 1969-70 will not be acceptable. If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption.

4. The plan to reassign 1,245 students from presently overcrowded black schools is approved.

5. Reassignment of the Paw Creek students to Woodland is approved.

6. The proposals of the Board for restructure of attendance lines; for consideration of pairing and grouping schools; for review of the construction programs; and for support programs, student exchange and faculty orientation are approved in principle, although for lack of specific detail and time table they are not approved as presented.

7. The Board is directed to prepare and present by November 17, 1969, the following:

(1) Plan for complete faculty desegregation for 1970-71.

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(2) Plan for student desegregation for 1970-71, including making full use of zoning, pairing, grouping, clustering, transportation and other techniques, complete with statistics and maps and other data showing precisely what (subject to later movement of pupils) the assignment of pupils and teachers will be for the year 1970-71, having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible. (The assumption in the Board's report that a school is desegregated when it has as many as 10% of a minority race in its student body is not accepted by the court, and neither the Board nor the court should be guided by such a figure.) "Possible" as used here refers to educational—not "political"—possibility. If Anson County, two-thirds black, can totally desegregate its schools in 1969, as they have now done, Mecklenburg County should be able to muster the political will to follow suit.

(3) A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools.

8. Since a mid-city high school may prove most desirable, the Board is directed pending further orders of court not to divest itself of any land, options, rent arrangements or other access to or control over real estate which it may now have in the Second Ward area.

9. Jurisdiction is retained.

This the 15th day of August, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Order dated August 29, 1969

The School Board's amended plan for desegregation of the Charlotte-Mecklenburg schools was approved by order of court dated August 15, 1969. The Board has now tendered a modification to this plan which was filed today, August 29, 1969.

The modification relates to the facilities to be provided for those black children whose parents exercise freedom of choice to attend a black elementary school in the inner city instead of attending the white schools listed in the July 29, 1969 plan which has already been approved by the court.

The amendment calls for using the building of former Irwin Avenue Junior High School with certain minor renovations, instead of Zeb Vance School, and a limit of six hundred students upon those who would be admitted to this program at Irwin Avenue School. This part of the motion to amend is approved. The choice of building, *per se*, is a matter for the School Board, not the court.

The amendment proposes that the Irwin Avenue School would be operated "as an innovative school." The court does not know what this means. If by this phrase is meant that anything will be done to make this school more attractive to the black students than the black schools they have been attending, then the program will constitute the location and use of a school facility for the purpose of promoting segregation which by previous decisions of this and other courts the defendants have been fully advised is unconstitutional. *Felder, et al. v. Harnett County, North Carolina*, 409 F.2d 1070 (4th Circuit, 1969) (decided April 22, 1969), and cases cited therein. The addition of "innovations" at Irwin Avenue School will not be approved by the court unless these "innovations" have been arranged and

Order dated August 29, 1969

provided for all the black students who transfer to white schools under the July 29, 1969 plan of the Board previously approved. The phrase "innovative" may refer to what the Board has heretofore called "compensatory education." The court has not yet been advised of any performance by the Board in line with the undertaking in its July 29, 1969 plan to provide "compensatory education" for pupils who lag behind their classmates in academic achievement. Unless and until the court can be informed and satisfied that this "compensatory education" is provided in the other schools, the court is of the opinion that providing it in the Irwin Avenue School would set up a magnet to attract black children away from desegregated assignments and therefore on the present record at least that part of the plan is disapproved.

The proposal to provide transportation for any of the students attending Irwin Avenue School is expressly disapproved. The effect of providing transportation is to subsidize at tax payers' expense those who are actively seeking to defeat the constitutional mandate to desegregate the schools. No authority is advanced or suggested to justify such a flagrant violation of the law, and none has been imagined by the court. The Board is expressly restrained from and enjoined against providing transportation in any form to any student in the system, black or white, which may or might enable him to travel any part of the distance from his home to or from any school elected by or for him under "freedom of transfer" or "freedom of choice," except that the Board may provide transportation as previously ordered by this court to those students who elect to transfer or who are transferred by the Board from a school in which their race is in a majority to a school in which their race

Order dated August 29, 1969

is in the minority. As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations.

This the 29th day of August, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Order dated October 10, 1969

On April 23, June 20 and August 15, 1969, orders were entered directing the defendants to submit a plan and a time table for the desegregation of the Charlotte-Mecklenburg schools, to be completed by the fall of 1970. Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of duty by the Board to desegregate the schools "at the earliest possible date." Limited steps have been taken toward compliance with the pupil desegregation provisions of that original order. However, the major part of the job remains undone, and no plan for desegregation of the entire system has apparently been voted on by the Board.

The latest order set November 17, 1969, as the revised date for defendants to file a complete plan and time table. Defendants have now filed a 15-page motion and supporting affidavit asking the court to extend by another two and one-half months, to February 1, 1970, the time for compliance with the orders. Plaintiffs oppose the extension.

The justification advanced for this delay is that they have hired a systems analyst to re-draw attendance lines, and that the three months between August 15 and November 17 are not enough time to program a computer and prepare a plan.

It would be a happy day if the job could be turned over to a computer. A computer, if programmed objectively, could produce objective results; all could blame the machine (in addition to the court) for any unpleasant decisions. Also, the court would like to avoid unnecessary pressure on the school staff and administrators.

However, the information thus far available is inadequate to justify the extension. Computers are for time-saving,

Order dated October 10, 1969

not delay. The computer work was estimated by the Board's chosen systems analyst, Mr. Weil, to require ninety man days of work. He proposes to consume ninety calendar days with this job! The Board's motion says that their decisions about construction and location of 21 building projects (involving many millions of dollars) are to be held up pending development of the plan. The school budget approaches fifty million dollars. The question fairly arises why the Board should not employ or assign more than one person at a time to feed the computer. Mr. Weil's original plan, which is in evidence, was prepared in a very few days. The court has on file also three or four other plans, including at least one which local school officials say is educationally and technically feasible, which were prepared in a few days each. The use of a computer does not appear to justify the delay.

Moreover, computers cannot make political nor legal decisions; they react to what is fed into them; and the request for postponement leaves the court to speculate over what will be fed into the computer. The motion does not say that Mr. Weil has been instructed by the Board to frame a plan to desegregate the schools; his commission, by a Board committee only, is limited to re-drawing attendance lines; the vague references in the Board's motion to his instructions as to travel limitation and specified school capacities and desirable racial balance permit the inference, in fact, that his mission could be *re-segregation* of much of the system.

The motion also contains no commitment on the part of the Board to adopt any plan that the computer may produce; it gives no information about the Board's intentions as to other desegregation methods it will use; and it promises no *result* from the delay except *consideration* by the

Order dated October 10, 1969

Board of a computer plan for re-arranging school lines.

The motion is preoccupied with one *method*, and silent about *results*.

Before passing on the motion, the court has a duty to discover what the Board has accomplished since its July 29 promises were made, and whether the extra time will promote genuine progress toward compliance with the Constitution or whether it will just be time lost.

The Board is therefore directed to file with the court by October 29, 1969, the following information:

1. A full statistical report on the results of the closing of the inner-city schools and where the 4,200 black pupils the Board proposed on July 29 to transfer to white schools are actually going to school as of October 10, 1969.

2. The figures regarding the effect of freedom of transfer on the desegregation proposed in the July 29, 1969 plan for closing inner-city schools and transferring their students.

3. A report on freedom of choice or freedom of transfer: How many children, by school or location and race, chose to transfer out of and into the various schools for the 1969-70 year.

4. Full reports on the current numbers and races of the children and teachers in the system, school by school, with percentages of each race for each school.

5. A report on the children being provided bus transportation, school by school.

6. A description of what has been done to provide the compensatory education programs proposed in the July 29 plan and policy statement.

Order dated October 10, 1969

7. A copy of all September and October, 1969, reports of the Board to the Department of Health, Education and Welfare.

Unless the Board has made the hard decisions needed to desegregate the schools, the time spent on a computer plan may well be just more time lost, and delaying decision may simply compress into fewer months next year the decisions that should have already been made. Therefore, in addition to the above, the Board is directed to answer by October 29, 1969, the following questions:

1. What, in verbatim detail, are the instructions that have been given to Mr. Weil?

2. What is Mr. Weil's assigned mission or goal?

3. What areas of the district is he directed to include in his program of re-drawing attendance lines?

4. What areas, if any, is he directed to exclude?

5. What schools will his program affect?

6. Will pairing, grouping or clustering of schools be used by the Board as needed to supplement the computer plan?

7. Will the Weil program of re-drawing attendance lines produce desegregation of all the schools by September, 1970?

8. If the Weil program does not produce desegregation of all the schools by September, 1970, what does the Board plan to do to produce that result?

9. Will any plan produced by the Weil method or any other re-drawing of attendance lines desegregate

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the schools if unrestricted freedom of transfer or freedom of choice is retained?

The value of the answers to these nine questions is substantially dependent on whether they are made by vote of the full Board or by non-voting representatives such as attorneys or other agents.

Pending receipt of the above information, the court will defer action on the request for time extension. Action will also be deferred for the present on the motions which have been filed by the plaintiffs which include requests for abolition of freedom of choice and appointment of an outside expert to devise a plan in default of Board action.

This the 10th day of October, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Order dated November 7, 1969

On October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case, *Alexander v. Holmes County*, Case No. 632. That decision, the most significant in this field since *Brown v. Board of Education*, peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

*" * * * should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin v. School Board, 377 U. S. 218, 234 (1964); Green v. School Board of New Kent County, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)*

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

It is this court's opinion that the word "dual" in the Supreme Court opinion is another word for "segregated," and that "unitary" is another word for "desegregated" or "integrated." It is also this court's opinion that although,

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as defendants say, this is not Mississippi, nevertheless the Supreme Court's prohibition against extension of time as laid down in *Alexander v. Holmes County* is binding upon this court and this school board, and bars the exercise of the court's usual discretion in such matters, and that to allow the request of the defendants for extension of time to comply with this court's previous judgments would be contrary to the Supreme Court's decision and should not be done.

Therefore, and based also upon the considerations set out in the memorandum opinion to be filed contemporaneously herewith, the motion of the defendants for extension of time for compliance with the court's August 15, 1969 order is denied. Ruling on all other pending motions is deferred.

This the 7th day of November, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Memorandum Opinion dated November 7, 1969**PRELIMINARY STATEMENT**

On Wednesday, October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case (*Alexander v. Holmes County*, Case No. 632). That decision peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

*" * * * should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin v. School Board, 377 U. S. 218, 234 (1964); Green v. School Board of New Kent County, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)*

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

The Mississippi school districts in the *Holmes County* case had degrees of desegregation ranging from nearly zero to about 16% of the Negro pupils. They like Mecklenburg hoped that their "freedom of choice" plans would satisfy the Constitution.

Memorandum Opinion dated November 7, 1969

The request for time extension, and all later proceedings in this cause, must be considered in light of the Supreme Court's reaffirmation of the law which this court has been following, and in light of the urgency now required by the *Holmes County* decision.

THE RESULTS OF THE 1969 PLAN

For pupil desegregation, the July 29, 1969 plan proposed to close seven black inner-city schools (most or all of which had previously been ear-marked for eventual "phase-out") and to transfer their 3,000 students in specified numbers to named suburban schools. All the transferee schools except West Charlotte were white. In addition, 1,245 black students, in specified numbers, were to be transferred from eight black or largely black schools to other designated suburban white schools.

The plan was accepted and approved because of its apparent promise to extend the opportunities of a desegregated education to over 4,000 new black students.

The plan has not been carried out as advertised: (a) Only 73 of the 1,245 scheduled for transfer from overcrowded black schools have been so transferred; those 73 were transferred not to the schools designated, but to other schools not mentioned in the plan. (b) It is now revealed that the closed schools, which were billed in July to produce 3,000 black students for transfer, actually had only 2,627 students in them when the schools closed in June! (c) The Board allowed full freedom of choice for students from the closed schools, and those students in large numbers elected to go to Harding High School, and to Williams Junior High, Northwest Junior High and other black schools, instead of to the assigned white schools. As a result, Harding High School was transformed immediately

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from 17% black to 47% black. This produced community consternation but no racial disorder among the students. The result may be deplorable, but the fact that the students at Harding High School have adjusted peaceably to the situation (like others before them at Cornelius, Davidson, Olympic, Randolph Road, Hawthorne and Elizabeth, and like the people of Anson and other North Carolina counties) shows that Mecklenburgers can live with desegregated schools. (d) The transfers proposed simply appear never to have been made to most of the suburban schools named in the plan. (e) *The plan therefore transferred to white schools only 1,315 instead of the promised 4,245 black pupils!* From closed schools, the elementary transferees numbered 463 instead of the advertised 1,235; junior high transferees were 273 instead of 630; and senior high transferees were 506 instead of 1,135; and from overcrowded schools 73 instead of 1,245. If Harding (47% black, 630 Negro students), Olympic (42% black, 376 Negro students), and Wilmore (49% black, 228 Negro students) should be allowed to continue their rapid shift from white to black, the net result of the 1969 pupil plan would be nearly zero.

Faculty desegregation has significantly and commendably improved since the April 27 order. Nevertheless, only six "black" schools and one "black" kindergarten have predominantly white faculties; and 98 out of the 106 schools and kindergartens in the system are today readily and obviously identifiable by the race of the heavy majority of their faculties.

The "performance gap" is wide.

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THE SITUATION TODAY

The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98-99%	9	4,801	49	4,850
95-97%	12	10,836	505	11,341
90-94%	17	14,070	1,243	15,313
86-89%	10	8,700	1,169	9,869
	<hr/> 57	<hr/> 45,012	<hr/> 2,968	<hr/> 47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98-99%	5	41	3,432	3,473
90-97%	3	121	1,297	1,418
56-89%	6	989	2,252	3,241
	<hr/> 25	<hr/> 1,153	<hr/> 16,197	<hr/> 17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		
		WHITE	BLACK	TOTALS
32-49%	10	4,320	2,868	7,188
17-20%	8	5,363	1,230	6,593
22-29%	6	3,980	1,451	5,431
	<hr/> 24	<hr/> 13,663	<hr/> 5,549	<hr/> 19,212
TOTALS:	106	59,828	24,714	84,542

Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714

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Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils ..	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

The schools are still in major part segregated or "dual" rather than desegregated or "unitary."

The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from

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public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "*de facto*," and the resulting schools are not "unitary" or desegregated.

FREEDOM OF CHOICE

Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the "black" schools.*

Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green v. New Kent County*, 391 U.S. 430 (1968):

"* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate

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as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason.

THE "NATIONAL STANDINGS"

The defendants filed some statistics concerning the one hundred largest school systems in the country, and say that Charlotte-Mecklenburg desegregation compares favorably with that in most of those systems. That may well be so. The court is not trying cases involving the other ninety-nine school boards, and has not studied any evidence about them and does not know their factual nor legal problems. The court in its first order of April 23, 1969 has noted the substantial desegregation achieved in certain areas in the Charlotte-Mecklenburg system, and is still aware of it. The fact that other communities might be more backward in observing the Constitution than Mecklenburg would hardly seem to support denial of constitutional rights to Mecklenburg citizens. The court doubts that a double standard exists. The Attorney General of the United States has filed suit for desegregation in Connecticut as well as in the whole State of Georgia. One of the most stringent desegregation orders on record was entered recently against a school board in the City of Chicago. Constitutional rights will not be denied here simply because they may be denied or delayed elsewhere. There is no "Dow-Jones average" for such rights. With all due deference to the complexities of this school system, which have already been fully noted

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in previous opinions, the Board and the community must still observe the Constitution. The fact that the school system ranks high in some artificial "national standings" or that one-third of the Negro students do attend desegregated schools or predominantly white schools is no answer to the constitutional problems presented by sixteen thousand black Mecklenburgers still going to all-black or largely black schools in this predominantly white community.

THE PROSPECTS FOR THE FUTURE

The second part of the Board's report is answers to the court's questions designed to determine whether the Board has made the hard decisions necessary to desegregate the schools.

The answers show that those decisions have not been made.

The computer expert has been given restrictions which, taken at face value, indicate that his work will not lead to desegregation of all the schools. One such restriction has the apparent effect of limiting attendance to those who live a maximum of roughly a mile and a half from the school. (This is the requirement that all grids or areas must be "contiguous to the home grid or to grids which are contiguous to the home grid.") Another is the limitation that no school attended by whites should have less than a 60% white student population. (Unless this were coupled with a further requirement that no school attended by blacks shall have more than a 40% black student population, this appears to put the black schools "off limits" for his study.) The original verified motion of the School Board contained two other limitations. Those were that "a 'desirable' racial balance should be obtained" and that "reasonable limitation on distance of travel for a child has been imposed." The

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record is silent on what these limitations mean and whether they are still in effect.

The Board has not accepted pairing and grouping and clustering of schools as legitimate techniques, but has simply indicated that it will "consider" those techniques where they offer "reasonable prospects of producing stable desegregation * * *." (Emphasis added.)

The report states unconditionally that:

"The information supplied by the systems analysis approach will not produce desegregation of all schools by September, 1970. Dramatic results are expected. It is hoped that the number of all white and all black schools will be substantially reduced. The number of such schools cannot be determined at this time." (Emphasis added.)

The report also says that:

" * * The Board of Education does not feel that it will be possible to produce pupil desegregation in each school by September, 1970. It is expected that faculties will fairly represent a cross section of the total faculty so that most and possibly all schools will not have a racially identifiable faculty. Furthermore, the restructuring of attendance lines coupled with faculty desegregation may satisfy constitutional requirements."* (Emphasis added.)

The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools.

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By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

Withholding or delaying the constitutional rights of children to equal educational opportunity on such vague terms as these is not the province of the School Board nor of this court.

Furthermore since the Supreme Court has now prohibited lower courts from granting extensions of time, it may well be that the gradual time table laid down by this court's April 23, 1969 order contemplating substantial progress in 1970 and complete desegregation by September 1970) was and is too lenient.

If the plan rendered by the School Board on November 17, 1969 is thorough and informative, and sufficiently shows an unconditional purpose on the part of the Board to complete its job effective by September, 1970, the Board may perhaps be allowed to adhere to the existing time table. Certainly a Mecklenburg plan ought if possible to be prepared by the Mecklenburg School Board and its large and experienced staff, rather than by outside experts. Decision on that and other pending questions must await further developments, including the Board's November 17, 1969 report.

CONCLUSIONS

The school system is still discriminatorily segregated by race and maintained that way by state action. In many ways it is not in compliance with the Constitution. The Board has not shown a valid basis for an extension of time

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to comply with the court's judgment; it has shown no intention to comply by any particular time with the constitutional mandate to desegregate the schools; and it has suggested its intention *not* to comply by September, 1970. In spite of those facts the court would like as a matter of discretion to grant some of the time extension requested, but is of the considered opinion that in *Alexander v. Holmes County* the Supreme Court has prohibited the exercise of such discretion. The findings of fact in this opinion will be considered, along with facts found in previous orders, opinions and memoranda, as the basis for such future judgments and orders as may be appropriate, including such judgments and orders as may be appropriate upon receipt of the Board's November 17, 1969 plan. All statements of fact in this memorandum opinion, whether or not labeled as such, shall be deemed findings of fact, as necessary to support such judgments and orders.

This the 7th day of November, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

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On April 23, June 20 and August 15, 1969, the defendant school board was ordered to file plans to desegregate the schools of Charlotte and Mecklenburg County, North Carolina. The defendants have admitted their duty to desegregate the schools; considerable progress has been made toward desegregation of faculties; and progress, previously noted, has been made in some other areas. The schools, however, remain for the most part unlawfully segregated. The facts supporting that conclusion in all the court's previous orders are reiterated here.

The issue is what to do pursuant to the board's latest plan, filed November 17, 1969. The plan recites the following ostensible purpose:

"The Board of Education has embarked upon a comprehensive program for the purpose of restructuring attendance lines involving all schools and all students served by the system. The primary purpose of this program is to achieve further desegregation in as many schools as possible * * *."

The plan says that a computer analyst has been hired to draw up various *theoretical* possible school zone attendance lines, and that school personnel, before February 1, 1970, will draw the *actual* lines.

The details of the plan show that it contains no promise nor likelihood of desegregating the schools.

The plan and the report accompanying it say (emphasis added):

"No school district to which white students are assigned should have less than 60 per cent white student population to avoid 'tipping.'" (Plan, page 2.)

* * * * *

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"... it is the plan of this School Board to limit schools to which white students are assigned to those schools in which it is possible to provide a student population which is at least 60 per cent white." (Plan, page 5.)

* * * * *

"In determining the initial attendance lines, the ratio of black to white students will not exceed 60% white—40% black WHERE THE SCHOOL IS DESEGREGATED." (Report, page 5.)

* * * * *

"A majority of the Board of Education believes that the constitutional requirements of desegregation will be achieved by the restructuring of attendance lines, the restricting freedom of transfer, and other provisions of this plan. The majority of the Board has, therefore, discarded further consideration of pairing, grouping, clustering and transporting." (Plan, page 6.)

The strongest claim made in the plan with respect to the all-black schools is that among 43 elementary schools in the densely populated areas of Charlotte it is "*theoretically* [school board's emphasis] possible to populate these schools with the following ratios of black students: . . . Seven (7) schools in which the black student population is 100 per cent." (Plan, pages 3 and 4.) Since the 100% black elementary schools in the system (Billingsville, Marie Davis, Double Oaks, First Ward, Lincoln Heights, Oaklawn and University Park) number exactly seven, this language obviously proposes that these seven schools will remain all-black.

The plan contains no factual information nor estimate regarding plans for desegregation of the 31 other elemen-

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tary schools, the 20 junior high schools, and the 10 senior high schools in the system.

Concerning faculty desegregation the plan says:

"During the 1970-71 school year, the Board of Education will staff each school so that the faculty at each school will be predominantly white and, where practicable will reflect the ratio of white and black teachers employed in the total faculty of the school system."
(Plan, page 7.)

With regard to the physical facilities, the court on August 15, 1969, ordered the defendants to produce by November 17 "A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools." In response to that order, the plan lists the names of 21 out of 91 projects, expresses a few opinions and conclusions about the building program, and promises a partial study by February 1, 1970 and a "general long range study" *"by June of 1970,"* but it sheds no factual light on the effect of any part of the building program on the segregation issue. Since the board has, in seven months, failed to produce a program for desegregation, it is only natural that they can not predict the effect of any particular building project on such a program. The court has yet not received information necessary to appraise the effects of current building activity on the current unprogrammed course of desegregation.

When the plan is understood, it boils down to this:

1. It proposes to re-draw school zone lines, and to restrict freedom of choice, which the court had already

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advised the board to eliminate except where it would promote desegregation. It states no definable desegregation goals.

2. The "60-40" ratio is a one-way street. The plan implies that there will be no action to produce desegregation in schools with black populations above 40%, *and that no white students are to be assigned to such schools.*

3. Continued operation of all seven of the all-black elementary schools would be assured. The same would appear to be true for the entire group of 25 mostly "black" schools, mentioned in the court's November 7 order, which serve 16,197 of the 24,714 black students in the system.

4. Transportation to aid children transferring out of segregated situations (which was ordered by the court on April 23 as a condition of any freedom of transfer plan, *and which was a part of this plan as advertised in the board's October 29 report*) has been eliminated from the plan as filed with the court. Inevitable effects of this action would be to violate the court order and to leave the children recently reassigned from seven closed black inner-city schools with no way to reach the suburban schools they now attend! This is *re-segregation*.

5. Other methods (pairing, grouping, clustering of schools) which could reduce or eliminate segregation—and which the board, on October 29 when it was asking for a time extension, promised to consider—have now been expressly left out of the plan.

6. No time is set to complete the job of faculty and pupil desegregation.

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7. In the written argument ("Report") filed with the plan, with the candor characteristic of excellent attorneys, the board's attorneys say:

"It is important that the Court does not construe the information submitted in the plan relating to racial ratios of elementary schools as being in the nature of a guarantee by the Board since it is anticipated the results of restructuring the attendance lines may produce a greater or lesser degree of desegregation, the extent of which cannot be determined at this time." (Report, page 4; emphasis added.)

The defendants have the burden to desegregate the schools and to show any plan they propose will desegregate the controls. They have not carried that burden. Re-drawing school zone lines won't eliminate segregation unless the decision to desegregate has first been made.

THE SCHOOLS ARE STILL SEGREGATED

The extent to which the schools are still segregated was illustrated by the information set out in previous orders including the order of November 7, 1969. Nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black. Over 16,000 black students still attend predominantly black schools. Nine-tenths of the faculties are still obviously "black" or "white." Over 45,000 out of 59,000 white students still attend schools which are obviously "white."

THE RESULT IS UNEQUAL EDUCATION

The following table further illustrates the results. Groups A and B show that sixth graders, in the seven

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100% black schools the plan would retain, perform at about fourth grade levels, while their counterparts in the nine 100% white elementary schools perform at fifth to seventh grade levels. Group C shows that sixth graders in Barringer, which changed in three years from 100% middle income white to 84% Negro, showed a performance drop of 1½ to 2 years. Group D shows however that Randolph Road, 72% white and 28% Negro, has eighth grade performance results approximately comparable to Eastway, which is 96% white, and Randolph results are approximately two years ahead of all-black Williams and Northwest. Until unlawful segregation is eliminated, it is idle to speculate whether some of this gap can be charged to racial differences or to "socio-economic-cultural" lag.

If the courts should accept the defendants' contention that all they have to do is re-draw attendance lines and allow a type of freedom of choice, two-thirds or more of the black children in Mecklenburg County would be relegated permanently to this kind of separate but unequal education.

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 6, REPORTED IN
GRADE EQUIVALENT, 1965-66/1968-69

GROUP A - 100% Black
Elementary

	WM	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65
Billingsville	37/39	39/42	43/45	36/37	37/38	41/44	38/39	42/43	37/38
Marie Davis	42/43	42/44	49/48	39/41	43/45	45/48	43/41	43/45	39/40
Double Oaks	44/40	42/40	49/46	35/36	41/39	45/44	41/37	44/40	41/37
First Ward	43/40	42/41	50/48	39/36	40/39	44/46	43/41	48/44	42/40
Lincoln Heights	45/44	44/44	52/49	44/42	45/43	46/48	43/41	47/46	42/41
Oakawn	44/44	42/45	50/53	42/47	41/45	50/49	43/44	41/49	40/47
University Park	44/44	44/47	51/48	43/43	40/44	46/48	41/44	46/46	41/43

GROUP B - 100% White
Elementary

Devonshire	52/59	54/62	57/60	57/64	49/53	53/63	55/59	57/64	57/65
Hidden Valley	59	62	61	62	51	60	59	64	67
Merry Oaks	62/60	66/66	66/67	66/71	53/54	59/65	67/64	70/68	73/72
Montclair	66/67	68/72	69/70	71/76	58/60	61/67	66/68	70/71	76/77
Pinewood	67/64	68/68	71/68	71/71	58/61	62/67	68/71	72/71	73/70
Rama Road	68/67	68/72	70/71	73/76	58/61	64/67	70/70	72/73	76/78
Shamrock Gardens	59/56	61/57	66/57	64/62	52/53	58/57	63/57	65/61	62/61
Thomasboro	58/55	59/55	63/58	59/58	52/51	55/57	60/56	63/59	64/61
Windsor Park	61/64	63/68	61/66	65/69	55/53	59/63	63/62	65/69	67/72
	61/46	63/46	64/50	66/42	53/45	59/48	64/44	65/47	68/45

GROUP C - Barringer

*100% white in 1965
84% black in 1968-69

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 8, REPORTED IN
GRADE EQUIVALENT, 1965-66/1968-69

GROUP D - Junior High

	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65	1965/1968 -64-65
Randolph Road (28% black)	78/80	82	79	62	79	76	79	81
Williams (100% black)	55/52	67/64	55/52	52/49	58/61	58/55	56/56	55/56
Northwest (100% black)	59/58	73/71	59/56	54/50	60/61	58/58	59/57	59/58
Eastway (96% white)	84/82	85/86	83/81	74/67	79/82	81/75	83/82	87/87

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THE LAW STILL REQUIRES DESEGREGATION

Segregation in public schools was outlawed by the decisions of the Supreme Court in *Brown v. Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion (*Brown I*) held that racial segregation, even though physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

"Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children

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and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.* * * *"
(Emphasis added.)

* * * * *

"* * * Such segregation has long been a *nationwide problem, not merely one of sectional concern.*" (Emphasis added.)

The selection of cases for the *Brown* decision demonstrates the nationwide reach of that concern; *Brown* lived in Kansas and the defendant board of education was that of Topeka, Kansas; defendants in companion cases included school authorities in Delaware and the District of Columbia. Later important cases have involved not just Southern schools, but also schools in New York, Chicago, Ohio, Denver, Oklahoma City, Kentucky, Connecticut and other widely scattered places.

Court decisions setting out the principles upon which the various orders of this court have been based include the following:

SUPREME COURT CASES

Alexander v. Holmes County (Mississippi), No. 632 (October 29, 1969).

Brown v. Board of Education of Topeka (Kansas), 347 U. S. 483 (1954), 349 U. S. 294 (1955).

Cooper, Members of the Board of Directors of the Little Rock (Arkansas) Independent School District v. Aaron, 358 U. S. 1 (1958).

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Green v. County School Board of New Kent County (Virginia), 391 U. S. 430 (1968).

Griffin v. County School Board of Prince Edward County (Virginia), 377 U. S. 218 (1964).

Keyes v. Denver (Colorado) School District Number 1, Application for Vacation of Stay (Justice Brennan, Supreme Court, August 29, 1969).

Monroe v. Board of Commissioners of the City of Jackson (Tennessee), 391 U. S. 450 (1968).

Raney v. Board of Education of the Gould School District (Arkansas), 391 U. S. 443 (1968).

United States v. Montgomery County (Alabama) Board of Education, 395 U. S. 225 (1969).

CIRCUIT COURT CASES

Brewer v. School Board of City of Norfolk (Virginia), 397 F.2d 37 (4th Cir., 1968).

Felder v. Harnett County (North Carolina) *Board of Education*, 409 F.2d 1070 (4th Cir., 1969).

Wanner v. County School Board of Arlington County (Virginia), 357 F.2d 452 (4th Cir., 1966).

Henry v. Clarksdale (Mississippi) *Municipal Separate School District*, 409 F.2d 682 (5th Cir., 1969) (*petition for cert. filed*, 38 U.S.L.W. 3086) (U. S. 9/2/69) (No. 545).

United States v. Greenwood (Mississippi) *Municipal Separate School District*, 406 F.2d 1086 (5th Cir., 1969) (*cert. denied*, 395 U. S. 907 (1969)).

United States v. Hinds County School Board, Nos. 28030 and 28042 (5th Cir., July 3, 1969).

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Clemons v. Board of Education of Hillsboro, Ohio, 228 F.2d 853 (6th Cir. 1956) (*cert. denied*, 350 U. S. 1006).

United State v. School District 151 of Cook County, Illinois (Chicago), 404 F.2d 1125 (7th Cir., 1968) (*rehearing denied*, January 27, 1969).

DISTRICT COURT CASES

Eaton v. Board of Education of Hanover County (North Carolina) Board of Education, No. 1022 (E.D. N.C., July 14, 1969).

Keyes v. School District Number One, Denver (Colorado), 303 F. Supp. 289 (D. Colo., 1969).

Some of these principles which apply to the Charlotte-Mecklenburg situation are:

1. Racial segregation in public schools is unlawful, *Brown I*; *Green v. New Kent County, Virginia*; *Clemons v. Hillsboro, Ohio*. Such segregation is unlawful even though not required nor authorized by state statute, *Clemons v. Hillsboro*. Acts of school boards perpetuating or restoring separation of the races in schools are *de jure*, unlawful discrimination, *Cooper v. Aaron*; *Keyes v. Denver, Colorado School Board* (August 14, 1969), approved by the Supreme Court of the United States two weeks later, *Keyes v. Denver*, U. S. Supreme Court, August 29, 1969.

2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful, *Keyes v. Denver*; *Brewer v. Norfolk*; *Clemons v. Hillsboro*; *Henry v. Carksdale, Mississippi*; *United States v. Hinds County*; *United States v. Greenwood*.

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3. No procedure, plan, method or gimmick will legalize state maintained segregation. The constitutional test of a plan is whether it gets rid of segregation in public schools, and does it "now," *Green v. New Kent County*; *Monroe v. Jackson*; *Alexander v. Holmes County*.

4. Good faith of the school authorities, if it exists, does not excuse failure to desegregate the schools. ". . . The availability to the Board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the Board to explain its preference for an apparently less effective method." *Green v. New Kent County*. (Emphasis added.)

5. "Natural boundaries" for school zones are not constitutionally controlling. If a zone encloses a black school in a district like this one where white students are in a heavy (71% white, 29% black) majority, the "naturalness" of the boundary or the existence of reasons for the boundary unrelated to segregation does not excuse the failure to desegregate the school, *Keyes v. Denver, Colorado*; *Henry v. Clarksdale*; *Clemons v. Hillsboro*.

6. It is appropriate for courts to require that school faculties be desegregated by formula, if necessary, and by a definite time or on a definite schedule, *United States v. Montgomery*. Faculty assignments so that each school has approximately the same ratio of black teachers as the ratio of black teachers in the school system at large are appropriate and necessary to equalize the quality of instruction in this school system, *United States v. Montgomery*; *United States v. Cook County*; *Eaton v. New Hanover County* (North Carolina).

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7. Bus transportation as a means to eliminate segregation results of discrimination may validly be employed, *Keyes v. Denver*; *United States v. Cook County*, Illinois, 404 F.2d 1125, 1130 (1969).

8. Race may be considered in eliminating segregation in a school system, *Wanner v. Arlington County, Virginia*; *United States v. Cook County*; *Green v. New Kent County*.

9. "... Whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state imposed segregation has been completely removed." *Green v. New Kent County*; *Raney v. Board of Education*.

10. The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin v. School Board*; *United States v. Cook County, Illinois*.

11. The fact that public opinion may oppose desegregating the schools is no valid argument against doing it, *Cooper v. Aaron*, *Green v. New Kent County*; *Monroe v. Jackson*.

12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

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13. School location and construction and renovation and enlargement affect desegregation. Courts may properly restrain construction and other changes in location or capacity of school properties until a showing is made that such change will promote desegregation rather than frustrate it, *Felder v. Harnett County*.

14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation, *Green v. New Kent County*; *Keyes v. Denver*; *Eaton v. New Hanover County*, *North Carolina Board of Education*.

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green v. New Kent County*; *Henry v. Clarksdale*; *United States v. Hinds County*.

16. The school board is endowed by Chapter 115, Section 176 of the General Statutes of North Carolina with "full and complete" and "final" authority to assign students to whatever schools the board chooses to assign them. The board may not shift this statutory burden to others. In *Green v. New Kent County*, the Supreme Court said of "freedom of choice":

"Rather than foster the dismantling of the dual system the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must . . . fashion steps which promise realistically to convert

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promptly to a system without a 'white' school and a 'Negro' school but just schools."

17. Pairing of grades has been expressly approved by the appellate courts, *Green v. New Kent County*; *Felder v. Harnett County*. Pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this county ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools.

19. The school board has a duty to promote acceptance of and compliance with the law. In a concurring opinion in *Cooper v. Aaron*, 358 U. S. at 26 (1958), Justice Frankfurter said:

"That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law,

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precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

"Lincoln's appeal to 'the better angels of our nature' failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, *is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.*" (Emphasis added.)

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IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. All facts found in this and previous orders, and all competent evidence including plans, reports and admissions in pleadings in the record are relied upon in support of this order.
2. The November 17 plan entitled "AMENDMENT TO PLAN FOR FURTHER DESEGREGATION OF SCHOOLS" is disapproved.
3. The defendants are directed to desegregate faculties in all the schools effective not later than September 1, 1970, so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system.
4. A consultant will be designated by the court to prepare immediately plans and recommendations to the court for desegregation of the schools. The legal and practical considerations outlined in detail in earlier parts of this opinion and order are for his guidance.
5. The defendants are directed to cooperate fully with the consultant. This cooperation will include but not be limited to providing space at the headquarters of the board of education in which he may work; paying all of his fees and expenses; providing stenographic assistance and the help of business machines, draftsmen and computers if requested, along with telephone and other communications services. He shall have full access to maps, drawings, reports, statistics, computer studies, and all information about all phases of the school system which may be necessary to prepare plans or reports. He shall be supplied with

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any studies and plans and partial plans for desegregation of the schools which the defendants may have. The defendants will provide this consultant with full professional, technical and other assistance which he may need in familiarizing himself with the school system and the various problems to be solved in desegregating the schools. Any and all members of the board of education who wish to cooperate in the preparation of such a plan may do so. The cooperation of the school administrators and staff will be requested and will be appreciated.

6. Action on the motion of plaintiffs for an order directing immediate desegregation of the entire system is deferred.

7. Further orders with reference to restraining construction and enlargement of schools are deferred.

8. Motion has been filed for a citation of the school board members for contempt of court. Litigants are bound by court orders and may be punished for disobedience of such orders even though such orders may ultimately be reversed on appeal, *Walker v. Birmingham*, 388 U. S. 307 (1967). The evidence might very well support such citations. Nevertheless, this is a changing field of law. Despite the peremptory warnings of *New Kent County* and *Holmes County*, strident voices, including those of school board members, still express doubt that the law of those cases applies to Mecklenburg County. This district court claims no infallibility. Contempt proceedings against uncompensated public servants will be avoided if possible. Action on the contempt citation is deferred.

9. If the members of the school board wish to develop plans of their own for desegregation of the schools, with-

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out delaying or interfering with the work of the consultant, they may proceed to do so, and if they wish any guidance from the court they will find their guidance in the previous opinions and orders of this court and in the court decisions and principles set out in this opinion and order.

10. Jurisdiction is retained for further orders as may be appropriate.

This is the 1st day of December, 1969.

/s/ JAMES B. McMILLAN

James B. McMillan

United States District Judge

Order dated December 2, 1969

The court appoints as a consultant under the terms outlined in the court's order of December 1, 1969, Dr. John A. Finger, Jr., of Providence, Rhode Island.

The school board and staff are directed to cooperate with Dr. Finger as set out in the December 1, 1969 order.

This the 2nd day of December, 1969.

/s/ JAMES B. McMILLAN

James B. McMillan

United States District Judge

Order dated February 5, 1970

On December 2, 1969, this court appointed Dr. John A. Finger, Jr., of Providence, Rhode Island, to study the Charlotte-Mecklenburg school system and advise the court how the schools could be desegregated. The defendant school board, by order of December 1, 1969, had been extended a fourth opportunity to submit a plan if they wished. Dr. Finger went to work; the school staff worked with him; and they have produced some extremely useful information and reports, which will be referred to in this order as the Board plan and the Finger plan.

Hearings on the plans were conducted on February 2 and February 5, 1970.

The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by re-zoning; however, the Finger plan goes further and produces desegregation of all the schools in the system.

Taken together, the plans provide adequate supplements to a final desegregation order.

The court would like again to express appreciation to Dr. Finger for the intelligence, resourcefulness and tact with which he has pursued his difficult assignment, and to Dr. William Self, Superintendent of the schools, and to his able staff, for the excellent work done by them in their difficult role of helping prepare one plan to comply with what the court believes the law requires, and simultaneously preparing another plan to suit the majority of the School Board who, at last reckoning, still did not appear to accept the court's order as representing the law of the land.

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The court is also grateful to the Board's outside consultant, Mr. Weil, of Systems Associates, Inc., whose two hundred days of work and whose computer studies formed the building blocks, or points of departure, for much of the work of the others.

Recent appellate court decisions have hammered home the message that sixteen years of "deliberate speed" are long enough to desegregate tax supported schools. On October 29, 1969, in *Alexander v. Holmes County*, 369 U.S. 19, the Supreme Court ordered numerous Deep South school districts to be completely desegregated by January 1, 1970; schools in Atlanta, Miami and parts of Chicago have been ordered totally desegregated; the Supreme Court in January ordered February 1, 1970, desegregation of 300,000 pupils in six Gulf Coast states; the Fourth Circuit Court of Appeals in *Nesbit v. Statesville*, — F.2d. — (December 2, 1969), ordered elimination by January 1, 1970, of the racial characteristics of the last black schools in Durham, Reidsville and Statesville, North Carolina; and in *Whittenberg v. Greenville, South Carolina*, the Fourth Circuit Court of Appeals, in an opinion by Chief Judge Clement F. Haynsworth, Jr., has just last month ordered the desegregation by February 16, 1970, of the 58,000 students in Judge Haynsworth's own home town. Judge Robert Martin of Greenville, pursuant to that mandate, on February 2, 1970, ordered all the Greenville schools to be populated by February 16, 1970, on a basis of 80% white and 20% black.

In the *Greenville* opinion the court said:

"These decisions leave us with no discretion to consider delays in pupil integration until September 1970. Whatever the state of progress in a particular school

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district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains no judicial discretion to postpone immediate implementation of the constitutional principles as announced in *Green v. County School Board of New Kent County*, 391 U.S. 430; *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 29, 1969); *Carter v. West Feliciana Parish School Bd.*, — U.S. — (Jan. 14, 1970)."

These decisions are binding on the United States District Court for the Western District of North Carolina. Unless that were true, the Constitution would mean whatever might be the temporary notion of whichever one of 340-odd federal judges happened to hear the case. This is a matter of law, not anarchy; of constitutional right, not popular sentiment.

The order which follows is not based upon any requirement of "racial balance." The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan. The fairest way the court knows to deal with this situation was stated clearly in the December 1, 1969 order, as follows:

"In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to

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understand that variations from that norm may be unavoidable."

THEREFORE, and in accordance with the specific, detailed, numbered guidelines of this court's order of December 1, 1969, IT IS ORDERED:

1. That the defendants discontinue the operation of segregated schools.
2. That the defendants take such action as is necessary to desegregate all the schools—students and faculty.
3. That desegregation of faculty be accomplished, as previously ordered, by assigning faculty (specialized faculty positions excepted) so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black and white faculty members throughout the system.
4. That teachers be assigned so that the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system.
5. That no school be operated with an all-black or predominantly black student body.
6. That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.
7. That transportation be offered on a uniform non-racial basis to all children whose attendance in any school

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is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more. Since the cost to the local system is about \$18 or \$20 a year per pupil, and the cost to the state in those areas where the state provides transportation funds is about another \$18 or \$20 a year per pupil, the average cost for transportation is apparently less than \$40 per pupil per year. The local school budget is about \$45,000,000 a year. It would appear that transporting 10,000 additional children, if that is necessary, and if the defendants had to pay it all, would add less than one per cent to the local cost of operating the schools. The significant point, however, is that the cost is not a valid legal reason for continued denial of constitutional rights.

8. That if geographic zones are used in making school assignments, the parts of a zone need not be contiguous.

9. That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before *Brown v. Board of Education*, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable.

10. That "freedom of choice" or "freedom of transfer" may not be allowed by the Board if the effect of any given transfer or group of transfers is to increase the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.

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11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the result of such transfers is to restore or increase the degree of segregation in either the transferor or the transferee school.

12. That if transfers are sought on grounds of "hardship," race will not be a valid basis upon which to demonstrate "hardship."

13. That the Board adopt and implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation.

14. That the defendants report to the court weekly between now and May 15, 1970, reporting progress made in compliance with this order; and that they report thereafter on July 15, August 15, September 15 and November 1, 1970, and on February 1 and May 1, 1971.

5. That the internal operation of each school, and the assignment and management of school employees, of course be conducted on a non-racial, non-discriminatory basis.

16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger,

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Jr., are *illustrations of means or partial means to that end.*¹ The defendants are encouraged to use their full "know-how" and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results*.

17. The choice or approval or partial approval of any proposed desegregation plan is subject to all the requirements and restrictions of the preceding sixteen paragraphs, as well as to any later requirements or restrictions set out in this order.

18. Subject to the above, the Board's pupil assignment plan for senior high school pupils is approved, with one

1. The following are exhibits to this order:

- A. The Board's map of proposed senior high school attendance zones.
- B. The Board's list of proposed senior high school populations.
- C. The Board's map of proposed junior high school attendance zones.
- D. The Board's list of proposed junior high school populations.
- E. Dr. Finger's map of proposed junior high school attendance zones.
- F. Dr. Finger's list of proposed junior high school populations.
- G. The Board's map of proposed elementary school attendance zones.
- H. The Board's list of proposed elementary school populations.
- I. Dr. Finger's map of proposed elementary school attendance zones.
- J. Dr. Finger's list of proposed elementary school populations.
- K. Dr. Finger's list of pairing and grouping of elementary schools and grades.

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exception. This exception is that black students, some 300 in number, should be assigned from map grids 294D, 295C, 295D, and 318A, to attend Independence High School.

19. Although the Board junior high school plan is inferior in design and results to Dr. Finger's plan, it is a purely "home grown" product and the court would like to approve it, if it can be brought into compliance with law by desegregating Piedmont Junior High School, and by adding transportation as above indicated, and by increasing the black attendance at several outlying schools. The Board may if it wishes consider (1) re-zoning; (2) two-way transporting of pupils between outlying schools and Piedmont; (3) closing Piedmont and assigning the pupils to Albemarle Road, Carmel, McClintock and Quail Hollow. Unless the court has been notified in writing by noon of February 6, 1970, of an affirmative decision adopting one of these choices by formal Board action, the junior high schools are directed to be desegregated according to Dr. Finger's plan, as illustrated by exhibits E and F.

20. The Board's plan for elementary schools, illustrated by exhibits G and H, cannot be approved because (1) it retains nine schools 83% to 100% black, serving over half the black elementary pupils, and (2) it leaves approximately half the 31,500 white elementary students attending schools that are 86% to 100% white; and (3) it promises to provide little or no transportation in aid of desegregation, even though the plan's zones in some cases are apparently five or six miles long. The Board plan for elementaries openly rejects the duty to eliminate all the black schools.

The Finger plan uses many of the same basic attendance lines as the Board plan; however, it does not stop short of

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the constitutional requirements, and by pairing and clustering groups of schools it achieves full desegregation of the elementary schools. The school staff worked out the details of this plan and are familiar with it. Its attendance zones are illustrated on the map, exhibit I; its elementary school populations are listed in exhibit J; and the pairing and grouping of the outlying and inner-city schools, grade by grade, are shown in detail on exhibit K. Subject to the qualifications previously stated, the Board is directed to follow the Finger plan with reference to elementary schools.

21. **THE TIME TABLE:** Deadlines to complete various phases of the program required in this order are as follows:

SENIOR HIGH SCHOOLS.—Seniors may remain in their present schools until the end of the school year; the Board may make any decision they deem wise about allowing seniors to transfer before graduation to schools where their race will be in the minority. *Eleventh and tenth graders* will be transferred to their new schools not later than the 4th day of May, 1970.

JUNIOR HIGH SCHOOLS (Grades 7, 8, 9).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

FACULTY.—Complete desegregation of the various faculties shall be accomplished by the various times set out above for desegregation of the student bodies.

22. **MODIFICATIONS.**—The intention of this order is to put on the Board the full duty to bring the schools into compliance with the Constitution as above outlined, but to leave maximum discretion in the Board to choose methods that will accomplish the required result. However, it is directed

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that leave of court be obtained before making any material departure from any specific requirement set out herein. The court will undertake to rule promptly on any such requests for deviation from prescribed methods.

23. *APPEAL.*—The court claims no infallibility and does not seek to prevent appeal from all or any part of this order, and will allow the making of any record needed to present on appeal any contention the parties desire to make, and will do what this court can to expedite such appeal. However, in accordance with *Whittenberg v. Greenville, supra*, this order will not be stayed pending appeal, and immediate steps to begin compliance are directed.

24. All evidence in the cause and all findings and conclusions in previous orders which support or tend to support this order are relied upon in support of this order.

25. Jurisdiction of this cause is retained for further orders.

This the 5th day of February, 1970.

James B. McMillan
United States District Judge

The Charlotte-Mecklenburg Schools
DESEGREGATION PLAN for 1970-71

Exhibit B

Senior High Schools

School	1970-71		1969-70					Board Plan			%B
	Base	Capacity +20%	B	W	T	%B	B	W	T		
East Mecklenburg	1700	2040	215	1925	2140	10%	360	1716	2076	17%	
Garinger	1874	2249	492	2148	2640	18%	721	1914	2635	27%	
Harding	1202	1442	612	720	1332	45%	395	692	1087	36%	
Independence	1047	1256	101	1111	1212	9%	23	1241	1264	2%	
Myers Park	1679	2015	224	1767	1991	12%	426	1883	2309	18%	
North Mecklenburg	1158	1390	446	1185	1631	28%	440	998	1438	31%	
Olympic	807	968	351	512	863	41%	201	687	888	23%	
South Mecklenburg	1523	1828	90	2024	2114	5%	482	1846	2328	21%	
West Charlotte	1593	1912	1641	0	1641	100%	597	1045	1642	36%	
West Mecklenburg	1374	1649	141	1444	1585	9%	494	998	1492	33%	
Total	13,957	16,749	4,313	12,836	17,149		4,139	13,020	17,159		

The Charlotte-Mecklenburg Schools

Exhibit D

DESEGREGATION PLAN for 1970-71

Junior High Schools

School	1970-71		1969-70				Board Plan		2B
	Base	Capacity +20%	B	W	T	2B	B	W	T
Albenarle Road	948	1138	63	995	1058	5%	19	753	772
Alexander	874	1049	328	761	1089	30%	303	698	1001
Cochrane	1190	1428	72	1544	1616	5%	571	1150	1721
Coulwood	704	845	101	770	871	12%	313	551	864
Eastway	1093	1312	61	1356	1417	4%	375	971	1346
Alexander Graham	996	1194	101	1028	1129	8%	261	888	1149
Hawthorne	850	910	550	472	1022	54%	276	704	980
Kennedy	801	961	802	9	811	99%	325	510	835
McClintock	923	1100	84	1288	1372	6%	25	1048	1073
Northwest	1068	1282	1032	1	1033		256	675	971
Piedmont	631	757	408	55	463	89%	758	84	842
Quail Hollow	1238	1486	129	1421	1550	9%	138	1144	1282
Randolph	972	1170	279	710	989	28%	307	683	990
Ranson	851	1021	246	548	794	31%	295	583	853
Sedgefield	777	930	167	809	976	17%	234	612	846
Smith	1093	1312	51	1436	1487	4%	330	957	1287
Spaugh	826	1091	262	839	1101	24%	346	752	1098
Williams	801	967	1081	0	1081	100%	336	722	1058
Wilson	1044	1253	60	1145	1205	5%	346	795	1141
Cornel	558	670					2	555	557
J. H. Gunn (Wilgrove)	558	670					49	470	519
Total	18,796	22,546	5,877	15,187	21,064		5,905	15,280	21,185

DESEGREGATION PLAN for Charlotte-Mecklenburg Schools
Junior High Schools

Exhibit F

School	1970-71 Capacity Base	1969-70				Court Consultant Plan			
		B	W	T	XB	B	W	T	XB
Albemarle Road	948	63	995	1058	5%	292	696	988	30%
Alexander	874	328	761	1089	30%	335	690	1025	33%
Cochrane	1190	72	1544	1616	5%	370	964	1354	27%
Coulwood	704	101	770	871	12%	245	568	813	30%
Eastway	1093	61	1356	1417	4%	351	839	1190	30%
Alexander Graham	996	101	1028	1129	8%	359	938	1297	28%
Hawthorne	850	550	472	1022	54%	290	677	967	30%
Kennedy	801	802	9	811	99%	184	606	790	23%
McClintock	923	84	1288	1372	6%	386	925	1311	30%
Northwest	1068	1032	1	1033		336	736	1072	31%
Piedmont	631	408	55	463	89%	243	538	781	32%
Quail Hollow	1238	129	1421	1550	9%	339	1050	1389	25%
Randolph	972	279	710	989	28%	402	832	1234	33%
Ranson	651	1021	548	794	31%	264	583	847	31%
Sedgefield	777	167	509	976	17%	171	641	812	21%
Smith	1093	51	1436	1487	4%	350	929	1279	27%
Spaugh	826	262	339	1101	24%	324	807	1131	29%
Williams	801	1081	0	1081	100%	308	727	1035	30%
Wilson	1044	60	1145	1205	5%	230	570	800	29%
Carmel	558	670				142	444	586	24%
J. H. Gunn	558	670				49	475	524	9%
Total	18,796	22,546	5,877	15,187	21,064	5,970	15,255	21,225	

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71		1969-70*				Board Plan			
	Base	Capacity +12%	B	V	T	%B	B	W	T	%B
Albemarle Rd.	432	484	4	510	514	1%	4	469	473	1%
Allenbrook	540	605	61	452	513	1%	59	496	555	11%
Ashley Park	621	696	27	574	601	4%	155	421	576	27%
Bain	702	786	33	735	768	4%	25	706	731	3%
Barringer	486	544	843	16	859	98%	203	320	523	39%
Berryhill	836	936	98	639	737	13%	247	574	821	30%
Beverly Woods	540	605	68	684	752	9%	8	648	656	1%
Billingsville	594	665	596	0	596	100%	113	325	438	26%
Brierwood	540	605	6	680	686	1%	2	663	665	0%
Bruns Ave.	675	756	759	10	769	99%	624	73	697	90%
Chantilly	432	484	0	472	472	0%	142	303	445	32%
Clear Creek	324	363	48	239	277	17%	43	266	309	14%
Collinswood	621	696	111	443	554	20%	224	448	672	33%
Cornelius	459	514	181	235	416	44%	182	265	447	41%
Cotswold	540	605	23	537	560	4%	128	449	577	24%
Davidson	324	363	104	186	290	36%	102	174	276	32%
Marie Davis	756	847	662	0	662	100%	666	82	748	88%
Derita	783	877	150	678	828	18%	132	595	747	20%
Devonshire	648	726	0	903	903	0%	0	925	925	0%
Dilworth	648	726	90	317	407	22%	241	376	617	39%
Double Oaks	675	756	836	0	836	100%	825	3	828	100%
Druid Hills	486	544	472	3	475	99%	465	20	485	96%
Eastover	648	726	42	559	601	7%	157	478	635	25%
Elizabeth	405	464	314	126	439	72%	112	294	406	28%
Enderly Park	513	575	3	371	374	1%	119	238	357	33%

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity		1969-70				Board Plan			
	Base	+12%	B	V	T	SB	B	V	T	SB
First Ward	702	786	805	0	805	100%	770	7	777	99%
Hickory Grove	459	514	70	533	603	12%	74	556	630	12%
Hidden Valley	648	726	0	1100	1100	0%	1	1077	1078	0%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	124	219	343	36%
Huntersville	675	756	145	531	676	21%	130	554	684	19%
Huntingtowne Farms	594	665	7	603	610	1%	3	614	617	0%
Idlewild	567	635	47	581	628	7%	59	549	608	10%
Irwin Ave.	378	423	232	0	232	100%	*			
Assy James			462	3	465	99%	90	169	259	35%
Lakeview	378	423	346	89	435	80%	119	285	404	29%
Lansdowne	756	847	75	802	877	9%	79	719	798	10%
Lincoln Heights	648	726	711	0	711	100%	903	6	909	99%
Long Creek	702	786	267	468	735	36%	259	523	782	33%
Matthews	945	1058	86	802	888	10%	81	837	918	9%
Merry Oaks	486	544	0	442	442	0%	0	557	557	0%
Ridwood	459	514	9	437	446	2%	116	401	517	23%
Montclair	675	756	0	718	718	0%	1	781	782	0%
Myers Park	432	484	22	444	466	5%	150	314	464	32%
Nations Ford	621	696	43	669	712	6%	177	548	725	24%
Newell	594	665	74	438	512	14%	64	436	500	13%
Oakdale	540	605	69	517	586	12%	202	460	662	31%
Oakhurst	594	665	5	616	621	1%	92	504	596	15%
Oaklawn	594	665	584	0	584	100%	597	3	600	99%
Olde Providence	540	605	80	512	592	14%	83	461	544	15%

*distributed to surrounding schools

The Charlotte-Mecklenburg Schools Exhibit B, page 3.

DESEGREGATION PLAN for 1970-71
Elementary Schools

School	1970-71		1969-70				Board Plan			
	Base	Capacity +12%	B	V	T	SB	B	V	T	SB
Park Road	540	605	44	548	592	7%	41	571	612	7%
Paw Creek	594	665	27	609	636	4%	83	602	685	12%
Paw Creek Annex	270	302	30	271	301	10%				
Pineville	486	544	136	356	492	28%	123	379	502	25%
Pinewood	648	726	0	674	674	0%	0	900	900	0%
Plaza Road	459	514	80	340	420	19%	181	350	531	34%
Rena Road	648	726	1	815	816	0%	3	744	747	0%
Sedgefield	540	605	3	548	551	1%	223	364	587	38%
Selwyn	486	544	31	617	648	5%	32	459	491	7%
Shamrock Gardens	486	544	0	515	515	0%	84	496	580	15%
Sharon	459	514	72	361	433	17%	91	421	512	18%
Starmount	648	726	25	712	737	3%	67	833	900	7%
Statesville Road	648	726	333	522	855	39%	160	553	713	23%
Steele Creek	378	423	5	509	514	1%	195	475	670	29%
Thomasboro	729	816	0	690	690	0%	135	777	912	15%
Tryon Hills	486	544	309	164	473	65%	200	342	542	37%
Tuckasegee	540	605	58	578	636	9%	57	510	567	10%
University Park	648	726	825	1	826	100%	735	132	867	85%
Villa Heights	810	907	902	83	985	92%	877	170	1047	83%
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%
Wilmore	378	423	222	210	432	51%	153	250	403	38%
Windsor Park	648	726	1	748	749	0%	1	782	783	0%
Winterfield	648	726	48	688	736	7%	52	653	705	7%
Total	40,301	45,239	13,010	31,278	44,288		12,885	31,523	44,408	

Exhibit J, page 1.

DESEGREGATION PLAN for Charlotte-Mecklenburg Schools

Elementary Schools

School	1970-71		1969-70				Court Consultant		
	Capacity	+20%	B	W	T	AB	B	W	T
Albemarle Rd.	432	434	4	510	514	1%	162	338	500
Allenbrook	540	605	61	432	513	12%	135	341	476
Ashley Park	621	696	27	574	601	4%	175	426	601
Bain	702	786	33	735	769	4%	25	706	731
Barringer	486	544	843	16	859	98%	203	320	523
Berryhill	836	936	93	639	737	13%	247	574	821
Beverly Woods	540	605	68	684	752	9%	186	446	632
Billingsville	594	665	596	0	556	100%	113	325	438
Briarwood	540	605	6	620	686	1%	256	479	735
Bruns Avenue	675	756	759	10	769	99%	252	540	792
Chantilly	432	484	0	472	472	0%	142	333	475
Clear Creek	324	363	48	229	277	17%	43	266	309
Collinswood	621	696	111	443	554	20%	224	406	630
Cornelius	455	514	181	235	416	44%	182	265	447
Cotswold	540	605	23	537	560	4%	128	404	532
Davidson	324	363	104	136	290	36%	102	174	276
Marie Davis	756	847	662	0	662	100%	193	532	725
Derita	783	877	150	678	828	18%	167	625	792
Devonshire	643	726	0	903	903	0%	333	624	957
Dilworth	648	726	90	317	407	22%	241	376	617
Double Oaks	675	756	836	0	836	100%	234	496	730
Druid Hills	486	544	472	3	475	99%	158	303	461
Eastover	648	726	42	559	601	7%	157	445	602
Elizabeth	405	454	314	125	439	72%	132	304	436
Enderly Park	513	575	3	371	374	1%	150	270	420

Elementary Schools

School	1970-71		1969-70				Court Consultant Plan			
	Capacity	+20%	B	W	T	%B	B	W	T	%B
First Ward	702	786	805	0	805	100%	265	686	951	28%
Hickory Grove	459	514	70	533	603	12%	272	439	711	38%
Hidden Valley	643	726	0	1100	1100	0%	310	679	989	31%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	139	244	333	36%
Huntersville	675	756	145	531	676	21%	130	534	694	19%
Huntingtowne Farms	594	665	7	603	610	1%	205	414	610	33%
Idlewild	567	635	47	581	628	7%	190	410	600	32%
Irwin Avenue	373	423	292	0	292	100%	*			
May James			462	3	465	99%	105	194	299	35%
Lakeview	378	423	346	29	435	80%	139	280	419	33%
Lansdowne	756	847	75	802	877	9%	207	496	703	29%
Lincoln Heights	648	726	711	0	711	100%	241	456	697	35%
Long Creek	702	785	267	468	735	38%	239	523	782	33%
Matthews	945	1058	36	302	880	10%	31	837	913	3%
Nerry Oaks	486	544	0	442	442	0%	106	236	342	31%
Midwood	455	514	9	437	446	2%	116	446	562	21%
Montclair	675	756	0	718	718	0%	250	504	784	36%
Myers Park	432	484	22	444	466	5%	150	445	595	25%
Nations Ford	621	696	43	669	712	6%	177	582	759	23%
Newell	594	665	74	438	512	14%	74	546	620	12%
Oakdale	540	605	69	517	586	12%	250	460	710	35%
Oakhurst	594	665	5	616	621	1%	197	534	731	27%
Oaklawn	594	665	584	0	584	100%	226	594	820	28%
Olde Providence	540	605	80	512	592	14%	145	351	496	29%

* Assigned from area to increase desegregation
 Oakhurst 105B
 Shiloh 105B
 Shiloh 105B
 Shiloh 105B

DESEGREGATION PLAN (Cont'd)

Elementary Schools

School	1970/71		1968-76				1968-76				T	W	B	%	T	W	B	%
	Capacity	Base	B	W	T	W	B	T	W	B								
Park Road	540	605	44	548	592	548	148	507	359	148	29%	359	148	7%	507	359	148	29%
Paw Creek	594	665	27	609	636	609	160	555	395	160	29%	395	160	4%	555	395	160	29%
Paw Creek Annex	270	302	30	271	301	271	83	292	209	83	28%	209	83	10%	292	209	83	28%
Pineville	486	544	136	356	492	356	123	502	379	123	29%	379	123	28%	502	379	123	29%
Pinewood	648	726	0	674	674	674	283	980	697	283	29%	697	283	0%	980	697	283	29%
Plaza Road	459	514	80	340	420	340	181	531	350	181	34%	350	181	19%	531	350	181	34%
Rama Road	648	726	1	815	816	815	273	766	493	273	36%	493	273	0%	766	493	273	36%
Sedgefield	540	605	3	548	551	548	223	587	364	223	33%	364	223	1%	587	364	223	33%
Selwyn	486	544	31	617	648	617	150	659	309	150	33%	309	150	5%	659	309	150	33%
Shamrock Gardens	486	544	0	515	515	515	174	685	511	174	25%	511	174	0%	685	511	174	25%
Sharon	459	514	72	361	433	361	123	568	245	123	33%	245	123	17%	568	245	123	33%
Starmount	648	726	25	712	737	712	217	852	441	217	33%	441	217	3%	852	441	217	33%
Statesville Road	648	726	333	522	855	522	160	713	553	160	23%	553	160	39%	713	553	160	23%
Steele Creek	378	423	5	509	514	509	135	670	475	135	29%	475	135	1%	670	475	135	29%
Thomasboro	729	816	0	690	690	690	230	1000	770	230	23%	770	230	0%	1000	770	230	23%
Tryon Hills	486	544	309	164	473	164	107	569	262	107	29%	262	107	69%	569	262	107	29%
Tuckasegee	540	605	58	578	636	578	119	697	300	119	28%	300	119	9%	697	300	119	28%
University Park	648	726	825	1	826	1	260	933	461	260	28%	461	260	100%	933	461	260	28%
Villa Heights	810	907	902	83	985	83	265	1000	668	265	30%	668	265	92%	1000	668	265	30%
Westerly Hills	405	454	46	539	585	539	144	676	332	144	30%	332	144	8%	676	332	144	30%
Wilmore	378	423	222	210	432	210	153	603	250	153	38%	250	153	51%	603	250	153	38%
Windsor Park	648	726	1	748	749	748	272	833	561	272	33%	561	272	0%	833	561	272	33%
Winterfield	648	726	48	688	736	688	261	798	537	261	33%	537	261	7%	798	537	261	33%
Total	40,391	45,239	13,010	31,278	44,288	31,278	12,984	44,370	31,366	12,984		31,366	12,984		44,370	31,366	12,984	

ELEMENTARY SCHOOLS TO BE PAIRED

Present School No Count	1 - 4		5 - 6	
	B	W	B	W
Albemarle Road	2	338	2	174
Allenbrook	0	341	0	156
Beverly Woods	1	446	1	249
Briarwood	4	477	2	220
Bruns Avenue	526	0	246	0
Marie Davis	431	59	193	26
Devonshire	0	624	0	276
Double Oaks	505	2	232	0
Druid Hills	310	2	158	1
First Ward	533	0	262	0
Hickory Grove	54	329	16	208
Hidden Valley	0	677	0	302
Huntingtowne Farms	0	414	0	195
Idlewild	0	410	0	163
Lansdowne	2	496	1	291
Lincoln Heights	456	0	239	0
Merry Oaks	0	236	0	119
Montclair	0	504	0	217
Oaklawn	405	0	193	0
Olde Providence	2	351	1	146
Park Road	0	300	0	160
Paw Creek	16	395	11	214
Paw Creek Annex	27	209	3	53
Pinewood	0	697	0	346
Rame Road	3	493	0	244
Selwyn	0	284	0	188
Sharon	0	245	0	117
Starmount	19	441	6	228
Tryon Hills	218	110	91	54
Tuckaseegee	49	300	19	171
University Park	550	0	260	0
Village Heights	683	114	264	48
Windsor Park	0	515	1	233
Winterfield	0	494	0	199
Total	4,876	10,303	2,201	4,998

22,

Exhibit K.

Charlotte-Mecklenburg Schools

ELEMENTARY SCHOOLS PAIRED

Grade 1-4					Grade 5-6				
<u>Schools</u>	B	W	T	%	<u>Schools</u>	B	W	T	%
Kingstons Farms					Bruno Avenue	252	540	792	32
Mount	545	1100	1645	33					
Wood					Marie Davis	193	532	725	27
Wood	431	1056	1487	29					
Wood					Double Oaks	234	496	730	32
Shire	589	1103	1692	35					
Valley					Druid Hills	158	303	461	34
Woods	310	679	989	31					
Providence					First Ward	265	606	951	29
	538	1293	1831	29					
Road					Lincoln Heights	241	456	697	35
Oaks	458	984	1442	32					
brook					Oaklawn	226	594	820	28
Creek									
Creek Annex	497	1245	1742	29	Tryon Hills	107	262	369	29
Asheville									
Grove	272	439	711	38	University Park	260	461	721	36
McClair					Villa Heights	265	668	933	28
Road	553	997	1550	36					
lyn									
dear Park									
terfield	683	1407	2090	33					
Total	4,876		15,179			2,201		7,199	
		10,303					4,998		

**Amendment, Correction or Clarification of Order
of February 5, 1970 dated March 3, 1970**

Paragraph 7 of the February 5, 1970, order read in part as follows:

"7. That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more."

Since February 5, estimates have been made by defendants that paragraph 7 would require transporting more than 23,000 pupils rather than 10,000 to 14,000, as estimated at the hearing. Upon reviewing the evidence introduced since that hearing, it appears that these higher estimates may be based on construing the above language of paragraph 7 so as to require an offer of transportation to all children who live more than 1½ miles from their school, including city children who are not now entitled to transportation. These, according to the testimony, may number as many as 13,000.

The court regrets any lack of clarity in the order which may have given rise to this interpretation. Paragraph 7 was never intended to require transportation beyond that now provided by law for city children who are not reassigned, nor for those whose reassignments are not required by the desegregation program.

Accordingly, paragraph 7 of the February 5, 1970 order is amended by deleting the words "attendance in any school" and inserting the words "reassignment to any school," in the first sentence.

This the 3rd day of March, 1970.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

**Court of Appeals Order Granting Stay Order of
March 5, 1970**

ORDER

An application for a stay pending appeal of the order of the District Court dated February 5, 1970 made to Judge Craven was by him referred to the entire Court pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

Upon consideration by the full Court, it appears that disposition of this appeal will depend in part upon a resolution of factual questions as yet undetermined in the District Court. Specifically, the parties are in wide disagreement as to the impact of the order upon the School Board's transportation system, the number of pupils for whom transportation will be required under the order, the number of school buses needed to provide such transportation, their availability, and the cost of their acquisition and operation. The resolution of such factual issues is necessary to an orderly consideration of the issues on appeal insofar as they are directed to the order's requirement that transportation be provided for pupils reassigned under the order.

To facilitate the hearing and the disposition of this appeal, the District Court is requested, after such evidentiary hearings as may be necessary, to make supplemental findings of fact respecting the general issue of busing and the effect of its order with respect to the number of pupils transported, the number of buses required, their availability, and the additional capital and operating costs of transportation.

The District Court is requested, if possible, to file a supplemental order or memorandum, including such findings of fact, by March 20, 1970.

*Court of Appeals Order Granting Stay Order of
March 5, 1970*

This appeal is accelerated. The hearing of the appeal will be scheduled in the Court of Appeals in Richmond, Virginia, on April 9, 1970 and the attorneys for all parties are directed to file their briefs in the office of the Clerk of the Court of Appeals for the Fourth Circuit not later than Tuesday, April 7, 1970.

Since it appears that the appeal cannot be heard and determined prior to April 1, 1970, the date for implementation of the first phase of the order of the District Court, and since the Court of Appeals is presently unable to appraise, in the absence of the requested additional findings of fact, the impact of the busing requirements,

It Is Now ORDERED that the order of the District Court dated February 5, 1970 be, and it hereby is, stayed insofar as it requires the reassignment of pupils for whom transportation would be required under the order but who are now not transported or who are now being transported at substantially less distance and at substantially less expense, such reassignments being those arising out of the pairing and clustering of schools with resulting cross-busing.

To the extent that the stay granted by this order requires other modifications in the District Court's order, such modifications as may appear appropriate to the District Court to achieve a cohesive and efficient system of public education are authorized.

Except with respect to the busing requirements of the order which are hereby stayed and the resulting necessary modifications hereby authorized, the application for a stay is denied, and implementation of the order of the District Court is directed at the times and in the manner specified

135a-2

*Court of Appeals Order Granting Stay Order of
March 5, 1970*

therein, subject to the further orders of this Court and the ultimate disposition of the appeal. This is in conformity with the general direction of the Supreme Court that orders of the District Court shall be implemented pending the hearing and determination of appeals from such orders. *Alexander v. Holmes County Board of Education*, 396 U.S. 19; *Carter v. West Feliciana Parish School Board*, — U.S. — (January 14, 1970).

By direction of the Court.

/s/ CLEMENT L. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

**Supplementary Findings of Fact
dated March 21, 1970**

Pursuant to the March 5, 1970 order of the Fourth Circuit Court of Appeals, the court makes the following supplemental findings of fact:

1. Paragraph seven of this court's order of February 5, 1970, as amended, reads:

"7. That transportation be offered on a uniform non-racial basis to all children whose reassignment to any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more. Since the cost to the local system is about \$18 or 20 a year per pupil, and the cost to the state in those areas where the state provides transportation funds is about another \$18 or \$20 a year per pupil, the average cost for transportation is apparently less than \$40 per pupil per year. The local school budget is about \$45,000,000 a year. It would appear that transporting 10,000 additional children, if that is necessary, and if the defendants had to pay it all, would add less than one per cent to the local cost of operating the schools. The significant point, however, is that cost is not a valid legal reason for continued denial of constitutional rights."

2. A bird's-eye picture of the indispensable position of the school bus in public education in North Carolina, and especially in the school life of grades one through six (elementary students) is contained in a summary by the de-

Supplemental Findings of Fact dated March 21, 1970

tendant Dr. Craig Phillips entitled "RIDING THE SCHOOL BUSES" (Plaintiffs' Exhibit 15), published January 1, 1970, which reads as follows:

"The average school bus transported 66 students each day during the 1968-69 school year; made 1.57 trips per day, 12.0 miles in length (one way); transported 48.5 students per bus trip, including students who were transported from elementary to high schools.

"During the 1968-69 school year:

610,760 pupils were transported to public schools by the State

54.9 percent of the total public school average daily attendance was transported

70.9 percent were elementary students

29.1 percent were high school students

3.5 students were loaded (average) each mile of bus travel

The total cost of school transportation was \$14,293,-272.80, including replacement of buses: The average cost, including the replacement of buses, was \$1,541.05 per bus for the school year—181 days; \$8.51 per bus per day; \$23.40 per student for the school year; \$.1292 per student per day; and \$.2243 per bus mile of operation." (Emphasis added.)

In Mecklenburg County, the average daily number of pupils currently transported on state school busses is approximately 23,600—plus another 5,000 whose fares are paid on the Charlotte City Coach Lines.

Supplemental Findings of Fact dated March 21, 1970

3. Separate bus systems for black students and white students were operated by the defendant Mecklenburg County Board of Education for many years up until 1961. Separate black and white bus systems were operated by the combined Charlotte-Mecklenburg Board from 1961 until 1966 (Defendants' answers to Plaintiffs' requests for admissions, Nos. 1 and 8, filed March 13, 1970).

4. Pertinent figures on the local school transportation system include these:

Number of busses	280
Pupils transported on school busses daily	23,600
Pupils whose fares are paid on Charlotte City Coach Lines, Inc.	5,000
Number of trips per bus daily	1.8
Average daily bus travel	40.8 miles
Average number of pupils carried daily, per bus	83.2
Annual per pupil transportation cost	\$19—\$20
Additional cost (1968-69) per pupil to state	\$19.92
Total annual cost per pupil transported	\$39.92
Daily transportation cost per pupil transported	\$0.22

5. Information about North Carolina:

Population	4,974,000
1969-71 total state budget	\$3,590,902,142

Supplemental Findings of Fact dated March 21, 1970

1969-71 total budgeted state funds for public schools	\$1,163,310,993
1968-69 amount spent by state on transportation (including replacement busses)	\$14,293,272.80
1969-71 appropriation for purchase of school busses	\$6,870,142
Average number of pupils transported daily, 1968-69	610,760
Average number of pupils transported daily per bus—statewide	66

6. The 1969-70 budget of the Charlotte-Mecklenburg school system is \$57,711,344, of which nearly \$51,000,000 represents operational expense and between \$6,000,000 and \$7,000,000 represents capital outlay and debt service. These funds come from federal, state and county sources, as follows:

FEDERAL	STATE	COUNTY	TOTAL
\$2,450,000	\$29,937,044	\$25,324,300	\$57,711,344

The construction of school buildings is not included in these budget figures (see Plaintiffs' Exhibit 6).

7. State expenditures in the past ten years have usually not equalled appropriations. There has been a sizeable operating surplus in the state budget for every biennium since 1959-60 (State Budget, page 86).

8. The state superintendent of public instruction in his biennial report (Plaintiffs' Exhibit 12) for the years 1966-68 recommended that "city transportation should be pro-

Supplemental Findings of Fact dated March 21, 1970

vided on the same basis as transportation for rural children as a matter of equity."

9. The 1969 report of the Governor's Study Commission on the Public School System of North Carolina (Plaintiffs' Exhibit 13) recommended that transportation be provided for all school children, city as well as rural, on an equal basis. Signatory to that report was one of the present defendants, the state superintendent of public instruction.

10. The basic support for the public schools of the state comes from the State Legislature.

11. Some 5,000 children travel to and from school in Mecklenburg County each day in busses provided by contract carriers such as Charlotte City Coach Lines, Inc. (Morgan's deposition of February 25, 1970, page 36).

12. Upon the basis of data furnished by the school board and on the basis of statistics from the National Safety Council, it is found as a fact that travel by school bus is safer than walking or than riding in private vehicles.

13. Traffic is of course heavy all over the 540 square miles of the county. Motor vehicle registration for 1969 was 191,165 motor vehicles (161,678 automobiles and 29,487 trucks).

14. Many children eligible for transportation do not accept that transportation. Estimates have been made that this number of those who do not accept transportation is in the neighborhood of 50% of those who are eligible.

Supplemental Findings of Fact dated March 21, 1970

15. Approximately 5,000 children in the system attend school outside the school zone in which they reside. Although requested of the defendants by the court on March 7, 1970, information as to where these children go to school has not been forthcoming and the defendants have indicated that it is impossible to produce it.

16. As the state transportation regulations* are understood by the court, the state will bear its share (about half) of transportation costs for children who live more than 1½ miles from their school, as follows:

- (a) All rural children, wherever they attend school;
- (b) All perimeter children (those living in territory annexed by the city before 1957), wherever they attend school; and
- (c) All inner city children assigned to schools in either the perimeter or the rural areas of the system.

17. The defendants submitted information on the number of children who live within 1½ miles of the schools which are to be desegregated by zoning. This information shows that East Mecklenburg, Independence, North Mecklenburg, Olympic, South Mecklenburg and West Mecklenburg high schools, and Quail Hollow and Alexander junior high schools, with total student populations of 12,184, have in the aggregate only 96 students who live within 1½ miles from the schools. Some 12,088 then are eligible for transportation. These same schools among them provide bus transportation for 5,349 students. This information illustrates the importance of the bus as one of the essential

* General Statutes of North Carolina, Chapter 115, §180-192.

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elements in the whole plan of operation of the schools. It also shows the wide gap between those entitled to transportation and those who actually claim it. There is no black school in the system which depends very much upon the school bus to get the children to school. The total number of children transported in October, 1969, to schools identifiable as black was 541 out of total population in those black schools of over 17,000. Black schools, including the new black schools, have been located in black areas where busses would be unnecessary. Suburban schools, including the newest ones, have been located far away from black centers, and where they can not be reached by many students without transportation.

18. Bus travel in both urban and rural areas takes time. An analysis of the records of bus transportation, based upon the reports of school principals, is contained in the extensive exhibits bearing Plaintiffs' Exhibit numbers 22, 23, 24, 25, 26 and 27. For the month of October, 1969, by way of illustration, these principals' reports when analyzed show that out of some 279 busses carrying more than 23,000 children both ways each day:

The average one way trip is one hour and fourteen minutes;

80% of the busses require more than one hour for a one way trip;

75% of the busses make two or more trips each day; Average miles traveled by busses making one round trip per day is $34\frac{1}{2}$; and

Average bus mileage per day for busses making two trips is 47.99.

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19. It was the testimony of Dr. Self and Dr. Finger, and the courts finds as a fact, that transportation provided by the school board's plans, which include narrow corridors several miles long and in places only one-half mile wide, proceeding in straight lines diagonally across streets and other obstacles, would be more expensive per capita than transportation under the satellite zone plan. The court plan calls for pick-ups to be made at a few points in each school district, as testified to by Dr. Self, and for non-stop runs to be made between satellite zones and principal zones. There will be no serious extra load on downtown traffic because there will be no pick-up and discharge of passengers in downtown traffic areas.

20. The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense.

21. On July 29, 1969 (pursuant to the court's April 23, 1969 order that they frame a plan for desegregation and that school busses could be used as needed), the defendants proposed a plan for closing seven inner-city black schools and bussing 4,200 students to outlying schools. The plan was approved. It had some escape clauses in it, and the defendants in practice added some others; but *as presented*, and as approved by the court, the "freedom of choice" contemplated was very narrowly restricted; and bussing of several hundred students has taken place under that plan.

22. Evidence of property valuations produced by the defendants shows that the value of the seven school proper-

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ties closed under the July 29, 1969 plan, and now for the most part standing idle, was over three million dollars.

23. The all-black or predominantly black elementary schools which the board plan would retain in the system are located in an almost exclusively Negro section of Charlotte, which is very roughly triangular in shape and measures about four or five miles on a side. Some are air-conditioned and most are modern. Virtually none of their patrons now ride busses; the schools were located where the black patrons were or were expected to be. These schools, their completion dates, and representative academic performances of their sixth grade graduating classes are shown in the following table:

COL

NS AV

CE DR

BLE O

CID HI

RST WA

SCOLN

GLANN

EVERSI

LLA HI

The information shown in
the first three columns
below was taken from answers
to interrogatories, Nos.
1-f, 1-g and 1-h, filed
October 25, 1968.

GRADE 6 AVERAGE ACHIEVEMENT TEST SCORES, SHOWN IN GRADE
EQUIVALENT (such as 6.2 = 6th grade, 2nd month), 1938-69.

	<u>YEAR BUILT</u>	<u>YEARS OF ADDITIONS</u>	<u>NO. OF MOBILE UNITS</u>	<u>WORD MEANING</u>	<u>PARAGRAPH MEANING</u>	<u>SPELLING</u>	<u>LANGUAGE</u>	<u>ACM (MATH)</u>	<u>ACN (MATH)</u>	<u>ADD (MATH)</u>
AVENUE	1968	--	0	4.1	4.1	4.7	4.1	4.0	4.7	4.1
DAVIS	1951	1953 1957 1959	0	4.3	4.4	4.8	4.1	4.5	4.8	4.1
OAKS	1952	1955 1965	1	4.0	4.0	4.6	3.6	3.9	4.4	3.7
HILLS	1960	1964	0	4.0	4.2	4.5	3.9	3.9	4.5	4.1
WARD	1912	1950 1961 1968	0	4.0	4.1	4.8	3.6	3.9	4.6	4.1
LN HEIGHTS	1956	1958	5	4.4	4.4	4.3	4.2	4.3	4.3	4.1
WN	1964	--	0	4.4	4.5	5.2	4.7	4.5	4.9	4.4
RSITY PARK	1957	1953 1964	5	4.4	4.7	4.8	4.3	4.4	4.8	4.4
HEIGHTS	1912	1934 1937	3	4.3	4.4	4.7	3.6	4.4	4.7	4.2

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24. Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

25. In the court's order of April 23, 1969, a suggestion was made that the board seek consultation or assistance from the office of Health, Education and Welfare. The board refused to do this, and as far as the court knows has not sought help from HEW.

26. Some 600 or more pupils transfer from one school to another or register for the first time into the system during the course of each month of the typical school year. It is the assignment of these children which is the particular subject of the reference in paragraph 13 of the order to the manner of handling assignments within the school year.

27. No plan for the complete desegregation of the schools was available to the court until the appointment of Dr. John A. Finger, Jr. and the completion of his tactful and effective work with the school administrative staff in December 1969 and January 1970. Dr. Finger has a degree in science from Massachusetts Institute of Technology and a doctor's degree in education from Harvard University, and twenty years' experience in education and educational problems. He has worked in a number of school desegregation cases and has a rare capacity for perception and solution of educational problems. His work with the staff had

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the catalytic effect of freeing and inducing the staff to work diligently in the preparation of plans that would accomplish the result required, and which would be cohesive and efficient from an educational point of view.

28. Hearings on the "Finger" plans and on the board's proposed plans were conducted on February 2 and February 5, 1970. These plans may best be understood if they are considered in four divisions:

29. *The plan for senior high schools.*—The plan ordered to be put into effect May 4, 1970 is the board's own plan for desegregation of the senior high schools in all particulars except that the order calls for the assignment to Independence High School of some 300 black children. The board contends the high school plans will call for additional transportation for 2,497 students and will require 69 busses. The court is unable to accept this view of the evidence. All transportation under both the board and the court plan is covered by state law.

30. *The plan for junior high schools.*—A plan for junior high schools was prepared by the board staff and Dr. Finger and was submitted to the court as Dr. Finger's plan. The board submitted a separate plan. Both plans used the technique of re-zoning. The school board's plan after all of their re-zoning had been done left Piedmont Junior High School 90% black and shifting towards 100% black. The plan designed by Dr. Finger with staff assistance included zoning in such a way as to desegregate all the schools. This zoning was aided by a technique of "satellite" districts. For example, black students from satellite districts in the central city area around Piedmont Courts will be assigned to Alexander Graham Junior High,

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which is predominantly white. Black students from the area around Northwest Junior High School (all-black) will be similarly transferred to Wilson Junior High, northwest of the air port. These one-way transfers, essentially identical in nature to the board's July 29, 1969 plan, will result in the substantial desegregation of all the junior high schools, which are left under this plan with black student populations varying from 9% at J. H. Gunn to 33% at Alexander and Randolph.

The court order did not require the adoption of the Finger plan. In paragraph 19 of the order the board were given four choices of action to complete the process of desegregating the junior high schools. These choices were (1) Re-zoning; (2) Two-way transporting of pupils between Piedmont and white schools; (3) Closing Piedmont and assigning the black students to other junior high schools; or (4) Adoption of the Finger plan.

The board elected to adopt and did adopt the Finger plan by resolution on February 9, 1970.

The defendants have offered figures on the basis of which they ask the court to find that 4,359 students will have to be transported under the junior high school plan and that 84 busses will be required. The court is unable to find that these contentions are borne out by the statistics and other evidence offered.

Dr. Self, the school superintendent, and Dr. Finger, the court appointed expert, both testified that the transportation required to implement the plan for junior highs would be less expensive and easier to arrange than the transportation proposed under the board plan. The court finds this to be a fact.

Two schools may be used to illustrate this point. Smith Junior High under the board plan would have a contigu-

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ous district six miles in length extending $4\frac{1}{2}$ miles north from the school itself. The district throughout the greater portion of its length is one-half mile wide and all roads in its one-half mile width are diagonal to its borders. East-way Junior High presents a shape somewhat like a large wooden pistol with a fat handle surrounding the school off Central Avenue in East Charlotte and with a corridor extending three miles north and then extending at right angles four miles west to draw students from the Double Oaks area in northwest Charlotte. Obviously picking up students in narrow corridors along which no major road runs presents a considerable transportation problem.

The Finger plan makes no unnecessary effort to maintain contiguous districts, but simply provides for the sending of busses from compact inner city attendance zones, non-stop, to the outlying white junior high schools, thereby minimizing transportation tie-ups and making the pick-up and delivery of children efficient and time-saving.

It also is apparent that if the board had sought the minimum departure from its own plan, such minimum result could have been achieved by accepting the alternative of transporting white children into and black children out of the Piedmont school until its racial characteristics had been eliminated.

In summary, as to junior high schools, the court finds that the plan chosen by the board and approved by the court places no greater logistic or personal burden upon students or administrators than the plan proposed by the school board; that the transportation called for by the approved plan is not substantially greater than the transportation called for by the board plan; that the approved plan will be more economical, efficient and cohesive and easier to administer and will fit in more nearly with the

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transportation problems involved in desegregating elementary and senior high schools, and that the board made a correct administrative and educational choice in choosing this plan instead of one of the other three methods.

31. *The plan for elementary schools.*—The elementary school desegregation program is best understood by dividing it into two parts: (a) The 27 schools being desegregated by zoning; and (b) The 34 schools being desegregated by grouping, pairing and transportation between school zones.

32. *The re-zoned group.* Two plans were submitted to the court. The school board plan was prepared for the board by its staff. It relied entirely upon zoning with the aid of some computer data supplied by Mr. Weil, a board employed consultant. It did as much as could reasonably be accomplished by re-zoning school boundaries. It would leave nine elementary schools 83% to 100% black. (These schools now serve 6,462 students—over half the black elementary pupils.) It would leave approximately half the white elementary students attending schools which are 86% to 100% white. In short, it does not tackle the problem of the black elementary schools in northwest Charlotte.

The "Finger plan" was the result of nearly two months of detailed work and conference between Dr. Finger and the school administrative staff. Dr. Finger prepared several plans to deal with the problem within the guidelines set out in the December 1, 1969 order. Like the board plan, the Finger plan does as much by re-zoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black

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students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger plan" itself in the form from which in principle the court approved on February 5, 1970, was prepared by the school staff and was filed with the court by representatives of the school board on February 2, 1970. It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools, if such desegregation is required by law to be accomplished.

This plan was drafted by the staff and by Dr. Finger in such a way as to make possible immediate desegregation if it should be ordered by an appellate court in line with then current opinions of appellate courts.

The testimony of the school superintendent, Dr. Self, was, and the court finds as a fact, that the zoning portion of the plan can be implemented by April 1, 1970 along educationally sound lines and that the transportation problems presented by the zoning portion of the plan can be solved with available resources.

The court has reviewed the statistics supplied to it by the original defendants with regard to elementary schools to be desegregated by re-zoning. These schools have been zoned with compact attendance areas and with a few exceptions they have no children beyond $1\frac{1}{2}$ miles distance from the school to which they are assigned. Although some transportation will be required, the amount is not considerable when weighed against the already existing capacity of the system. The court specifically finds that not more than 1,300 students will require transportation under this portion of the program and that the bus trips would be so

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short and multiple bus runs so highly practical that 10 school busses or less will be adequate.

33. *The pairing and grouping of 54 elementary schools.*—This part of the plan as previously described would group an inner city black school with two or more outlying white schools and assign children back and forth between the two so that desegregated fifth and sixth grades would be established in the presently black schools and desegregated grades one through four would be established in the presently white schools. The estimate of Dr. Finger and Dr. Self, the superintendent, was that this program would require transporting roughly 5,000 white pupils of fifth and sixth grade levels into inner city schools. The board in its latest estimate puts the total figure at 10,206. Just what is the net additional number of students to be transported who are not already receiving transportation is open to considerable question.

34. *The Discount Factors.*—The court accepts at face value, for the most part, the defendants' evidence of matters of independent fact, but is unable to agree with the opinions or factual conclusions urged by counsel as to the numbers of additional children to be transported, and as to the cost and difficulty of school bus transportation. The defendants in their presentation have interpreted the facts to suggest inconvenient and expensive and burdensome views of the court's order. Their figures must be discounted in light of various factors, all shown by the evidence, as follows:

- (a) Some 5,000 children daily are provided transportation on City Coach Lines, in addition to the

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23,600 and more who ride school busses. These have not been considered in the defendants' calculations.

(b) Not all students eligible for transportation actually accept it. The board's estimates of transportation, however, assume that transportation must be provided daily for all eligible students.

(c) Not all registered students attend all schools every day. The board's figures appear to assume they do. Statewide, average daily attendance is less than 94% of initial registration.

(d) The present average number of students transported round trip, to and from school, per bus, per day, is more than 83. The board's estimates, however, are based on the assumption that they can transport only 44 or 46 pupils, round trip, per bus, per day when the bus serves a desegregation role.

(e) Busses now being used make an average of 1.8 trips per day. Board estimates to implement the desegregation plan contemplate only one trip per bus per day!

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools.

(g) The board's figures do not contemplate using busses for more than one load of passengers morning or afternoon. Round trips instead of one-way trips morning and afternoon could cut the bus requirements sharply.

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(h) The number of busses required can be reduced 35% to 50% by staggering the opening and closing hours of schools so that multiple bus trips can be made. This method is not considered in the board's estimates, according to testimony of J. D. Morgan, bus superintendent.

(i) Substantial economies may reasonably be expected when all phases of the bussing operation have been coordinated instead of being considered separately.

(j) In estimating how many children live more than a mile and a half from schools, and therefore are entitled to transportation, the board's transportation people have used some very short measurements. As the court measures the maps, very few of the students in the re-zoned elementary schools, for example, live more than $1\frac{1}{2}$ miles from their assigned schools. If the board wants to transport children who live less than $1\frac{1}{2}$ miles away they may, but if they do, it is because of a board decision rather than because of the court's order.

(k) Transportation requirements could be reduced by raising the walking distance temporarily from $1\frac{1}{2}$ to perhaps $1\frac{3}{4}$ miles. This has apparently not been taken into account.

(l) Testimony of J. D. Morgan shows that busses can be operated at a 25% overload. Thus a 60-passenger bus (the average size) can if necessary transport 75 children. Some busses in use today transport far more.

35. *Findings of Fact as to Required Transportation.*—After many days of detailed study of maps, exhibits and

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statistics, and after taking into account all the evidence, including the "discount factors" mentioned above, the court finds as facts that the maximum number of additional children who may conceivably require transportation under the court ordered plans, and the maximum numbers of additional busses needed are as follows:

	<i>Net Additional Transportees</i>	<i>Number of Busses Needed</i>
Senior Highs	1,500	20
Junior Highs	2,500	28
Elementaries:		
Re-zoned	1,300	10
Paired and Grouped	8,000	80
Totals	13,300	138

36. These children (all but a few hundred at Hawthorne, Piedmont, Alexander Graham, Myers Park High School, Eastover, West Charlotte and a few other places), *if assigned to the designated schools, are entitled to transportation under existing state law, independent of and regardless of this court's order respecting bussing.*

37. The court also finds that the plan proposed by the board would have required transportation for at least 5,000 students in addition to those now being transported.

38. *Separability.*—Each of the four parts of the desegregation plan is separable from the other. The re-zoning of elementaries can proceed independent of the pairing and grouping. The pairing and grouping can take place independent of all other steps. *The implementation of the*

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pairing and grouping plan itself can be done piecemeal, one group or several groups at a time, as transportation becomes available. It was planned that way.

39. *The Time Table.*—The February 5, 1970 order followed the time table requested by the defendants. At the February 2 hearing, the school board attorney requested until April 1, 1970 to desegregate the elementary schools (T. 20); he requested that high school seniors be allowed to graduate where they are (T. 21); he proposed continuing junior high students and grades 10 and 11 in their present schools until the third week before the end of school (T. 21). The request of Dr. Self, the school superintendent, was identical as to elementaries and 12th graders; he preferred to transfer 10th and 11th graders about two weeks before school was over (T. 95). Availability of transportation was the only caveat voiced at the hearing.

40. The February 5 order expressly provided that "racial balance" was not required. The percentage of black students in the various parts of the plans approved vary from 3% black at Bain to 41% black at Cornelius.

41. *Cost.*—Busses cost around \$5,400.00 each, varying according to size and equipment. Total cost of 138 busses, if that many are needed, would therefore be about \$745,200.00. That is much less than one week's portion of the Mecklenburg school budget. Busses last 10 to 15 years. The state replaces them when worn out.

Some additional employees will be needed if the transportation system is enlarged.

Defendants have offered various estimates of large increased costs for administration, parking, maintenance, driver education and other items. If they choose to incur

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excess costs, the court can not prevent it. However, the evidence shows that school bus systems in Charlotte and other urban North Carolina counties tend to operate at lower costs per student than rural systems. Adding a larger number of short-range capacity loads should not tend to increase the present overall per capita cost of \$40 a year.

It is the opinion and finding of the court that the annual transportation cost per student, including amortization of the purchase price of the busses, will be at or close to \$40.00, and that the total annual cost, which is paid about half by the state and half by the county, of implementing this order, will not exceed the following:

For zoned Elementaries	(1,300)	\$ 52,000
For paired Elementaries	(8,000)	320,000
For Junior Highs	(2,500)	100,000
For Senior Highs	(1,500)	60,000
		<hr/>
		\$532,000*

41. *Availability.*—The evidence shows that the defendant North Carolina Board of Education has approximately 40 brand new school busses and 375 used busses in storage, awaiting orders from school boards. None had been sold at last report. The state is unwilling to sell any of them to Mecklenburg because of the "anti-bussing" law. No orders for busses have been placed by the school board.

If orders to manufacturers had been placed in early February, delivery in 60 or 90 days could have been anticipated. The problem is not one of availability of busses

* The local system's share of this figure would be \$266,000.00, which at current rates is only slightly more than the annual interest or the value of the \$3,000,000.00 worth of school properties closed in 1969.

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but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case.

This the 21 day of March, 1970.

/s/ JAMES B. McMILLAN

James B. McMillan

United States District Judge

Supplemental Memorandum dated March 21, 1970

Pursuant to the order of the Fourth Circuit Court of Appeals, filed March 5, 1970, this memorandum is issued.

Previous orders cover more than one hundred pages. The motions and exhibits and pleadings and evidence number thousands of pages, and the evidence is several feet thick. It may be useful to reviewing authorities to have a brief summary of the case in addition to the supplemental facts on the questions of transportation.

Before 1954, the schools in Charlotte and Mecklenburg County were segregated by state law. The General Assembly, in response to *Brown v. Board of Education*, adopted the Pupil Assignment Act of 1955-56, North Carolina General Statutes, §115-176, which was quoted in the April 23, 1969 order and which is still the law of North Carolina. It provides that school boards have full and final authority to assign children to schools and that no child can be enrolled in nor attend a school to which he has not been so assigned.

"Freedom of choice" to pick a school has never been a right of North Carolina public school students. It has been a courtesy offered in recent years by some school boards, and its chief effect has been to preserve segregation.

Slight token desegregation of the schools occurred in the years following *Brown*. The Mecklenburg County and the Charlotte City units were merged in 1961.

This suit was filed in 1965, and an order was entered in 1965 approving the school board's then plan for desegregation, which was substantially a freedom of choice plan coupled with the closing of some all-black schools.

There was no further court action until 1968, when a motion was filed requesting further desegregation. Most

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white students still attended "white" schools and most black students still attended "black" schools. The figures on this subject were analyzed in this court's opinion on April 23, 1969 (300 F.Supp. 1358 (1969)), in which the background and history of local segregation and its continuing discriminatory nature were analyzed at length. In that order the court ruled that substantial progress had been made and that many of the alleged acts of discrimination were not proved.

However, certain significant findings and conclusions were made which have been of record without appeal for eleven months. These include the following:

1. The schools were found to be unconstitutional segregated.
2. Freedom of choice had failed; no white child had chosen to attend any black school, and freedom of choice promoted rather than reduced segregation.
3. The concentration of black population in north west Charlotte and the school segregation which accompanied it were primarily the result of discriminatory laws and governmental practices rather than natural "neighborhood" forces. (This finding was reaffirmed in the order of November 7, 1969.)
4. The board had located and controlled the site and population of schools so as to maintain segregation.
5. The plan approved and put into effect in 1964 had not eliminated unlawful segregation.
6. The defendants operate a sizeable fleet of busses serving over 23,000 children at an average annual cost (to state and local governments combined) of not more than \$40 per year per pupil.

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7. Transportation by bus is a legitimate tool for school boards to use to desegregate schools.

8. Faculties were segregated, and should be desegregated.

9. Under *Green v. New Kent County School Board*, 391 U.S. 430 (1968), there was now an active duty to eliminate segregation.

The board was directed to submit a plan to desegregate the schools.

The order produced a great outcry from school board members and others. It also produced a plan which called for the closing of Second Ward, the only black high school located near a white neighborhood; and it produced no rezoning, no elimination of gerrymandering, and only minor changes in the pupil assignment plan. It did produce an undertaking to desegregate the faculties. The plan was reviewed in the court order of June 20, 1969, in which the court approved the provision for offering transportation to children transferring from majority to minority situations and directed the preparation of a plan for pupil desegregation.

The court also specifically found that gerrymandering had been taking place; and several schools were cited as illustrations of gerrymandering to promote or preserve segregation.

In June of 1969, pursuant to the hue and cry which had been raised about "bussing," Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called "anti-bussing" statute, N.C. G.S. 115-176.1. That statute reads as follows:

"§115-176.1. Assignment of pupils based on race, creed, color or national origin prohibited. —No person shall be refused admission into or be excluded from any public school in this State on account of

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race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creed, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment .

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible

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to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit. (1969, c. 1274.)"

The board's next plan was filed July 29, 1969, and was approved for 1969-70 by the order of August 15, 1969. The August 15 order contained the following paragraph:

"The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.' It has recognized that where people live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*"

The essential action of the board's July 29, 1969 plan was to close seven inner-city black schools and to re-assign their pupils to designated white suburban schools, and to

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transport these children by bus to these suburban schools. In addition, it was proposed to re-assign 1,245 students from named black schools to named suburban white schools and provide them transportation.

The total of this one-way transportation of black students only to white schools under this plan was stated to be 4,245 children.

No problem of transportation or other resources was raised or suggested.

The evidence of the defendants is that the property value of the schools thus closed exceeds \$3,000,000. For the most part, that property stands idle today.

The "anti-bussing" law was not found by the board to interfere with this proposed wholesale re-assignment and "massive bussing," of black children only, for purposes of desegregation.

The plan, by order of August 15, 1969, was approved on a one-year basis only, and the board was directed to prepare and file by November 17, 1969, a plan for complete desegregation of all schools, to the maximum extent possible, by September 1, 1970.

The defendants filed a motion asking that the deadline to prepare a plan be extended from November 17, 1969, to February 1, 1970. The court called for a report on the results of the July 29, 1969 plan. Those results were outlined in this court's order of November 7, 1969. In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board. (See defendants'

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March 13, 1970 response to plaintiffs' requests for admissions.)

The meager results of eight months of planning were further set out in this court's November 7, 1969 order, as follows:

"THE SITUATION TODAY

"The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		TOTALS
		WHITE	BLACK	
100%	9	6,605	2	6,607
98-99%	9	4,801	49	4,850
95-97%	12	10,836	505	11,341
90-94%	17	14,070	1,243	15,313
86-89%	10	8,700	1,169	9,869
	<hr/> 57	<hr/> 45,012	<hr/> 2,968	<hr/> 47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		TOTALS
		WHITE	BLACK	
100%	11	2	9,216	9,218
98-99%	5	41	3,432	3,473
90-97%	3	121	1,297	1,418
56-89%	6	989	2,252	3,241
	<hr/> 25	<hr/> 1,153	<hr/> 16,197	<hr/> 17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS		TOTALS
		WHITE	BLACK	
32-49%	10	4,320	2,868	7,188
17-20%	8	5,363	1,230	6,593
22-29%	6	3,980	1,451	5,431
	<hr/> 24	<hr/> 13,663	<hr/> 5,549	<hr/> 19,212
TOTALS:	106	59,828	24,714	84,542

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Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714
Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

"Of the 24,714 Negroes in the schools, something above 8,500 are attending 'white' schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

"The schools are still in major part segregated or 'dual' rather than desegregated or 'unitary.'

"The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts

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respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or '*de facto*,' and the resulting schools are not 'unitary' or desegregated.

"FREEDOM OF CHOICE

"Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

"As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the 'black' schools.*

"Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green v. New Kent County*, 391 U. S. 430 (1968):

"* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and

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more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

"Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason."

(The information on the two previous pages essentially describes the condition in the Charlotte-Mecklenberg schools today.)

Meanwhile, on October 29, 1969, the Supreme Court in *Alexander v. Holmes County*, 396 U. S. 19 (1969), ordered thirty Mississippi school districts desegregated immediately and said that the Court of Appeals

"... should have denied all motions for additional time because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin v. School Board*, 377 U.S. 218, 234 (1964); *Green v. School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

Because of this action and decision of the Supreme Court, this court did not feel that it had discretion to grant the requested time extension, and it did not do so.

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The board then filed a further desegregation plan on November 17, 1969. The plan was reviewed in the order of December 1, 1969. It was not approved because it rejected the goal of desegregating all the schools or even all the black schools. It proposed to concentrate on methods such as rezoning and freedom of choice and to discard any consideration of pairing, grouping, clustering and transporting or other methods. It proposed to retain numerous all-black schools.

The performance results, set out in previous orders, show that the all-black schools lag far behind white schools or desegregated schools.

The court, in an order dated December 1, 1969, reviewed the recent decisions of courts and laid out specific guidelines for the preparation of a plan which would desegregate the schools. A consultant, Dr. John A. Finger, Jr., was appointed to draft a plan for the desegregation of the schools for use of the court in preparing a final order. The school board was authorized and encouraged to prepare another plan of its own if it wished.

Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report. The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.

The detailed work on both final plans was done by the school board staff.

The high school plan prepared by the board was recommended by Dr. Finger to the court with one minor change.

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This change involved transporting three hundred inner city black children to Independence High School. As to high school students, then, the plan which was ordered by the court to take effect on May 4, 1970 is the school board's plan, with transportation added for three hundred students. The proportion of black children in the high schools varies from 17% to 36% under this plan.

For junior high schools, separate plans were prepared by Dr. Finger and by the board. The board plan would have used zoning to desegregate all the black junior high schools except Piedmont, which it would have left 90% black. The Finger plan employed re-zoning as far as appeared feasible, and then provided for transportation between inner city black zones and outlying white schools to desegregate all the schools, including Piedmont.

The court offered the school board the options of (1) re-zoning, or (2) closing Piedmont, or (3) two-way transport of students between Piedmont and other schools, or (4) accepting the Finger plan which desegregates all junior high schools.

The board met and elected to adopt the Finger plan rather than close Piedmont or rearrange their own plan. The Finger plan may require the transportation of more students than the board plan would have required, but it handles the transportation more economically and efficiently, and does the job of desegregating the junior high schools. The percentage of black students in the junior high schools thus constituted will vary from 9% to 33%.

The transportation of junior high students called for in the plan thus adopted by the board pursuant to the court order of February 5, 1970, is essentially the same sort that was adopted without hesitation for 4,245 black children when the seven black inner city schools were closed in 1969.

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For elementary schools the problem is more complicated. Dr. Finger prepared several plans to desegregate the elementary schools and reviewed them with the school staff. It was apparent that even the gerrymandering considered by the board could not desegregate all the elementary schools, and that without transportation there is no way by which in the immediate future the continuing effects of state imposed segregation can be removed. Dr. Finger prepared a plan which proposed re-zoning of as many schools as could be desegregated by re-zoning and which then proposed pairing or grouping of schools. By pairing or grouping, a black school and one or more white schools could be desegregated by having grades one through four, black and white, attend the white schools, and by having grades five and six, black and white, attend the black school, and by providing transportation where needed to accomplish this.

The original Finger plan proposed to group black inner city schools with white schools mostly in the south and southeast perimeter of the district.

The school staff drafted a plan which went as far as they could go with re-zoning and stopped there, leaving half the black elementary children in black schools and half the white elementary children in white schools.

In other words, both the plan eventually proposed by the school board and the plan proposed by Dr. Finger went as far as was thought practical to go with re-zoning. The distinction is that the Finger plan goes ahead and does the job of desegregating the black elementary schools, whereas the board plan stops half way through the job.

In its original form the Finger plan for elementary schools would have required somewhat less transportation than its final form, but would have been more difficult to

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put into effect rapidly. The pressure of time imposed by decisions of the Supreme Court and other appellate courts had become such that there was concern lest there be an order from one of the appellate courts for immediate February or March desegregation of the entire system. The school staff therefore, based on Finger's guidelines, prepared a final draft of his plan incorporating pairing, grouping and transporting on a basis which would better allow for early implementation with a minimum of administrative complications, in lieu of his original plan.

The result is that the plan for elementary schools which is known as the "Finger plan" was prepared in detail by the school staff and incorporates the thought and work of the staff on the most efficient method to desegregate the elementary schools.

The time table originally adopted by this court in April of 1969 was one calling for substantial progress in 1969 and complete desegregation by September 1970. However, on October 29, 1969, in *Alexander v. Holmes County*, the Supreme Court ordered immediate desegregation of several Deep South school systems and said that the Court of Appeals "*should have denied all motions for additional time.*" The Supreme Court adhered to that attitude in all decisions prior to this court's order of February 5, 1970. In *Carter v. West Feliciana Parish*, — U. S. — (January 14, 1970), they reversed actions of the Fifth Circuit Court of Appeals which had extended time for desegregating hundreds of thousands of Deep South children beyond February 1, 1970. In *Nesbit v. Statesville, et al.*, 418 F.2d 1040, the Fourth Circuit Court of Appeals on December 2, 1969, ordered the desegregation by January 1, 1970, of schools in Statesville, Reidsville and Durham, North Carolina. Referring to the *Alexander v. Holmes County* decision, the Fourth Circuit said:

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"The clear mandate of the Court is immediacy. Further delays will not be tolerated in this circuit." (Emphasis added.)

In that opinion the Court directed this district court to adopt a plan on December 19, 1969, for the City of Statesville, effective January 1, 1970, which *"must provide for the elimination of the racial characteristics of Morningside School by pairing, zoning or consolidation. . . ."* As to Durham and Halifax, Virginia, courts were ordered to accomplish the necessary purpose by methods including pairing, zoning, reassignment or *"any other method that may be expected to work."*

In *Whittenburg v. Greenville County, South Carolina*, — F.2d — (January 1970), the Fourth Circuit Court of Appeals, citing *Holmes County* and *Carter v. West Feliciana Parish*, said:

"More importantly the Supreme Court said emphatically it meant precisely what it said in Alexander that general reorganization of school systems is requisite now, that the requirement is not restricted to the school districts before the Supreme Court in Alexander, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970." (Emphasis added.)

As to *Greenville*, in a case involving 58,000 children, the Court said that

"The plan for Greenville may be based upon the revised plan submitted by the school board or upon any other plan that will create a unitary school system." (Emphasis added.)

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The Court further said:

"The District Court's order shall not be stayed pending any appeal which may be taken to this court, but, in the event of an appeal, modification of the order may be sought in this court by a motion accompanied by a request for immediate consideration."

Upon rehearing the Fourth Circuit Court of Appeals said on January 26, 1970:

"The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court. Any other course would be fraught with consequences, both disastrous and of great magnitude. If there are appropriate exceptions, if the District Courts and the Courts of Appeals are to have some discretion to permit school systems to finish the current 1969-1970 school year under current methods of operation, the Supreme Court may declare them, but no member of this court can read the opinions in CARTER as leaving any room for the exercise by this court in this case of any discretion in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year.

"For these reasons the petition for rehearing and for a stay of our order must be denied." (Emphasis added.)

The above orders of the Supreme Court and the Fourth Circuit Court of Appeals are the mandates under which this court had to make a decision concerning the plan to be adopted and the time when the plan should be implemented.

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This court conducted hearings on February 2 and February 5, 1970, upon the content and the effective date of the plans for desegregation of the Charlotte-Mecklenburg schools. On February 2nd, Mr. Waggoner, the attorney for the school board, requested the court to adopt a time table under which the elementary schools would be desegregated immediately after Easter (about April 1st) and the junior highs and senior highs would be desegregated in May, about the third week before the end of school. Dr. Self, the school superintendent, requested essentially the same time table.

Dr. Self testified that the job could be done as to all students in the times requested if transportation could be arranged; and he and Mr. Waggoner indicated that by staggering hours of school and by effective use of busses the transportation problem might be solved.

The Supreme Court in *Griffin v. Prince Edward County*, 377 U. S. 218 (1964), had held that a school board could and should validly be required by a district court to reopen a whole county school system rather than keep it closed to avoid desegregation, even though levying taxes and borrowing money might be necessary.

In view of the decisions above mentioned and the facts before the court, it appeared to this court that the undoubted difficulties and inconveniences and expense caused by transferring children in mid-year to schools they did not choose would have to be outweighed by the mandates of the Supreme Court and the Fourth Circuit Court of Appeals and that this court had and has a duty to require action now.

On February 5, 1970, therefore, a few days after the second *Greenville* opinion, this court entered its order for desegregation of the schools.

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The time table set in the February 5, 1970 order is precisely the time table suggested by Mr. Waggoner, the attorney for the defendants, in the record of the February 2, 1970 hearing.

Paragraph 16 of the February 5, 1970 order reads:

"The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end*. The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results*."

The above summary is an outline only of the most significant steps which have brought this case to its present position. Details of all the developments mentioned in this summary appear in previous orders and in the lengthy evidence.

Pursuant to the direction of the Circuit Court, this court has made and is filing contemporaneously herewith supplemental detailed findings of fact bearing on the transportation question.

This the 21st day of March, 1970.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

Order dated March 25, 1970

In the original order of April 23, 1969, and in the order of August 15, 1969, the projected time for completion of desegregation of the schools was set for September 1970. The court did not then consider and never has at any time considered that wholesale mid-year or mid-term transfers of pupils or teachers were desirable. Furthermore, it was contemplated by all parties that this time table would allow time for orderly development of plans as well as for appeal by all who might wish to appeal.

On October 29, 1960, in *Alexander v. Holmes County*, the Supreme Court ordered the immediate desegregation of schools involving many thousands of Mississippi school children. In *Carter v. West Feliciana Parish*, — U. S. — (January 14, 1970), the Supreme Court reversed the Fifth Circuit Court of Appeals and set a February 1, 1970 deadline to desegregate schools in Gulf Coast states involving many thousands of children. In *Nesbit v. Statesville*, 418 F.2d 1040, on December 2, 1969, the Fourth Circuit read *Alexander* as follows:

"The clear mandate of the Court is immediacy. Further delays will not be tolerated in this circuit."

In *Whittenburg v. Greenville County, South Carolina*, — F.2d — (January 1970), the Fourth Circuit Court of Appeals read *Alexander* to say that

"... general reorganization of school systems is requisite now, that the requirement is not restricted to the school districts before the Supreme Court in *Alexander*, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.

• • •

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"The District Court's order shall not be stayed pending any appeal which may be taken to this court, . . . (Emphasis added.)"

On January 26, 1970, on re-hearing, the Fourth Circuit Court of Appeals said:

"The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court. . . . no member of this court can read the opinions in *Carter* as leaving any room for the exercise by this court in this case of any discretion in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year."

The petition of Greenville for a stay of the order was again denied, and the Greenville schools were desegregated as of February 16, 1970.

The last *Greenville* decision was ten days old at the time of this court's order of February 5, 1970. These were the mandates under which it was ordered that the Charlotte-Mecklenburg schools should be desegregated before the end of the spring term, and that the mandate should not be stayed pending appeal.

Since that time, several suits have been filed in state court seeking to prevent implementation of the February 5, 1970 order, and decision by the three-judge court now considering the constitutionality of the "anti-bussing" law, North Carolina General Statutes, §115-176.1, does not appear likely before April 1, 1970. The appeal of the defendants in the *Swann* case to the Fourth Circuit Court of Appeals is not scheduled to be heard until April 9.

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1970, and there is no way to predict when a decision on that appeal will be rendered. There is also no way to predict when a final decision by the Supreme Court will be made on any of these issues, nor what the final decision may be.

Furthermore, notwithstanding the *Holmes County, Greenville, Carter* and *Statesville* decisions, the Fourth Circuit Court of Appeals has now rendered a stay as to certain portions of the February 5, 1970 order, and a petition to vacate that stay has been denied by the Supreme Court. The Fourth Circuit Court of Appeals and the Supreme Court have now demonstrated an interest in the cost and inconvenience and disruption that the order might produce—factors which, though bussing was not specifically mentioned, appear not to have been of particular interest to either the Fourth Circuit Court or the Supreme Court when *Holmes County, Carter, Greenville* and *Statesville* were decided.

The only reason this court entered an order requiring mid-semester transfer of children was its belief that the language of the Supreme Court and the Fourth Circuit above quoted in this order, given its reasonable interpretation, required district courts to direct desegregation before the end of this school year.

The urgency of "desegregation now" has now been in part dispelled by the same courts which ordered it, and the court still holds its original view that major desegregation moves should not take place during school terms nor piecemeal if they can be avoided.

Therefore, IT IS ORDERED, that the time table for implementation of this court's order of February 5, 1970 be, and it is hereby modified so that the implementation of the various parts of the desegregation order will not be

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Order dated March 25, 1970

required until September 1, 1970, subject, however, to any different decisions that may be rendered by appellate courts and with the proviso that the school board may if they wish proceed upon any earlier dates they may elect with any part or parts of the plan.

This is the 25th day of March, 1970.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

**Further Findings of Fact on Matters Raised by the
March 26, 1970, Motions of Defendants
dated April 3, 1970**

On March 26, 1970, the defendant school board filed "OBJECTIONS AND EXCEPTIONS TO SUPPLEMENTARY FINDINGS OF FACT OF MARCH 21, 1970, AND MOTION FOR MODIFICATION AND CLARIFICATION THEREOF." The court has reviewed the questions raised in that document and makes further findings of fact with reference to certain of its numbered paragraphs as follows:

¶¶ 1, 4, 16, 40. The annual school bus cost per pupil transported, including everything except the original cost of the bus, parking arrangements and certain local administrative costs, for the 1968-69 year, was \$19.92. The state reimburses the Charlotte-Mecklenburg school system approximately this \$19.92 per pupil. The April 23, 1969, and February 5, 1970, findings of fact estimated the original cost and periodic replacement of the busses themselves at \$18 to \$20 per pupil per year, which, added to the \$19.92, resulted in the estimate of \$40 as the total annual per pupil transportation cost. That estimate assumed that the local schools would have to pay for periodic *replacement* of busses as well as for their original purchase. Since it is now clear from the deposition of D. J. Dark that the replacement of worn out or obsolescent busses is *included* in the \$19.92 figure, the overall estimate of \$40 per pupil per year is far too high. Instead of a *continuing* annual local per pupil cost of \$18 or \$20 to supply and replace busses, as the court originally understood, the local board will have to bear only administrative and parking expenses, plus the original, one-time purchase of the busses. This cuts the annual cost of bus transportation from nearly \$40 per pupil per year as originally estimated, to a figure closer

*Further Findings of Fact on Matters Raised by the
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dated April 3, 1970*

to \$20 per pupil per year, and reduces the capital outlay required of the local board to the one-time purchase of about 138 busses at a cost of about \$745,200.00, plus whatever may prove to be actually required in the way of additional parking facilities. Paragraphs 1, 4, 16 and 40 of the supplemental findings of fact are amended accordingly.

¶¶ 2, 4, 11, 34. Although the evidence concerning the 5,000 children currently transported by City Coach Lines lacks clarity, the court agrees with the defendant that it should not be inferred that they are the source of payment for this transportation, and the court specifically corrects the previous finding so as to delete any reference to the source of payment for this transportation.

¶ 21. The school board's July 29, 1969 plan (see pages 457-459 of the record on appeal) proposed the transfer and transportation of over 4,200 black children. The court on November 7, 1969, on the basis of the then evidence, found that the number actually transferred was 1,315. The affidavit of J. D. Morgan dated February 13, 1970 (paragraph 4, page 770 of the record on appeal), indicated that the number of these students being transported was 738, requiring 13 busses. The findings of fact proposed by the defendants gave the number as "over 700." The J. D. Morgan affidavit of March 21, 1970, indicated that the number of busses was 30 instead of 13. From this conflicting evidence the court concluded that "several hundred" was as accurate as could be found under the circumstances.

¶ 33. Paragraph 33 is amended as requested by adding after the word "schools" in the eleventh line of the paragraph:

*Further Findings of Fact on Matters Raised by the
March 26, 1970, Motions of Defendants
dated April 3, 1970*

"—and about 5,000 black children, grades one through four, to outlying white schools."

¶ 34(f). The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately $5\frac{1}{2}$ miles. The average bus *trip* mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates—taking straight line mileage and adding 25%.

As to the other items in the document, the court has analyzed them carefully and finds that they do not justify any further changes in the facts previously found.

This the 3rd day of April, 1970.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

**Opinions of Court of Appeals
dated May 26, 1970**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,517

No. 14,518

JAMES E. SWANN, et al.,

Appellees and Cross-Appellants,

—versus—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,

Appellants and Cross-Appellees.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

(Argued April 9, 1970.

Decided May 26, 1970.)

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, and BUTZNER, Circuit Judges, sitting en banc.*

BUTZNER, Circuit Judge:

The Charlotte-Mecklenburg School District appealed from an order of the district court requiring the faculty and student body of every school in the system to be racially mixed. We approve the provisions of the order deal-

* Judge Craven disqualified himself for reasons stated in his separate opinion.

Opinions of Court of Appeals dated May 26, 1970

ing with the faculties of all schools¹ and the assignment of pupils to high schools and junior high schools, but we vacate the order and remand the case for further consideration of the assignment of pupils attending elementary schools. We recognize, of course, that a change in the elementary schools may require some modification of the junior and senior high school plans, and our remand is not intended to preclude this.

I.

The Charlotte-Mecklenburg school system serves a population of over 600,000 people in a combined city and county area of 550 square miles. With 84,500 pupils attending 106 schools, it ranks as the nation's 43rd largest school district. In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 369 F.2d 29 (4th Cir. 1966), we approved a desegregation plan based on geographic zoning with a free transfer provision. However, this plan did not eliminate the dual system of schools. The district court found that during the 1969-70 school year, some 16,000 black pupils, out of a total of 24,700, were attending 25 predominantly black schools, that faculties had not been integrated, and that other administrative practices, including a free transfer plan, tended to perpetuate segregation.

Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the

¹ The board's plan provides: "The faculties of all schools will be assigned so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system." We have directed other school boards to desegregate their faculties in this manner. See *Nesbit v. Statesville City Bd. of Ed.*, 418 F.2d 1040, 1042 (4th Cir. 1969); cf., *United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225, 232 (1969).

Opinions of Court of Appeals dated May 26, 1970

light of subsequent decisions of the Supreme Court, *Green v. School Bd. of New Kent County*, 391 U.S. 430, 435 (1968), *Monroe v. Bd. of Comm'rs*, 391 U.S. 450 (1968), and *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).

The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property² until *Shelley v. Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.³ The fact that similar forces operate in cities

² E.g., *Phillips v. Wearn*, 226 N.C. 290, 37 S.E.2d 895 (1946).

³ E.g., *Henry v. Clarksdale Munic. Separate School Dist.*, 409 F.2d 682, 689 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *United States v. School Dist. 151 of Cook County*, 404 F.2d 1125, 1130

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throughout the nation under the mask of *de facto* segregation provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools.

The disparity in the number of black and white pupils the Charlotte-Mecklenburg School Board busses to predominantly black and white schools illustrates how coupling residential patterns with the location of schools creates segregated schools. All pupils are eligible to ride school buses if they live farther than 1½ miles from the schools to which they are assigned. Overall statistics show that about one-half of the pupils entitled to transportation ride school buses. Only 541 pupils were bussed in October 1969 to predominantly black schools, which had a total enrollment of over 17,000. In contrast, 8 schools located outside the black residential area have in the aggregate only 96 students living within 1½ miles. These schools have a total enrollment of about 12,184 pupils, of whom 5,349 ride school buses.

II.

The school board on its own initiative, or at the direction of the district court, undertook or proposed a number of reforms in an effort to create a unitary school system. It closed 7 schools and reassigned the pupils primarily to increase racial mixing. It drastically gerrymandered school

(7th Cir. 1968), *aff'd* 286 F. Supp. 786, 798 (N.D. Ill. 1968); *Brewer v. School Bd. of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968); *Keyes v. School Dist. No. One, Denver*, 303 F.Supp. 279 and 289 (D. Colo.), *stay pending appeal granted*, — F.2d — (10th Cir.), *stay vacated*, 396 U.S. 1215 (1969); *Dowell v. School Bd. of Oklahoma City*, 244 F.Supp. 971, 975 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). See generally Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965). But see, *Deal v. Cincinnati Bd. of Ed.*, 419 F.2d 1387 (6th Cir. 1969).

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zones to promote desegregation. It created a single athletic league without distinction between white and black schools or athletes, and at its urging, black and white PTA councils were merged into a single organization. It eliminated the school bus system that operated on a racial basis, and established nondiscriminatory practices in other facets of the school system. It modified its free transfer plan to prevent resegregation, and it provided for integration of the faculty and administrative staff.

The district court, after a painstaking analysis of the board's proposals and the relevant authorities, disapproved the board's final plan, primarily because it left ten schools nearly all black. In reaching this decision, the district court held that the board must integrate the student body of every school to convert from a dual system of schools, which had been established by state action, to a unitary system.

The necessity of dealing with segregation that exists because governmental policies foster segregated neighborhood schools is not confined to the Charlotte-Mecklenburg School District. Similar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally. The solution is not free from difficulty. It is now well settled that school boards operating dual systems have an affirmative duty "to convert to a unitary school system in which racial discrimination would be eliminated root and branch." *Green v. School Bd. of New Kent County*, 391 U. S. 430, 439 (1968). Recently the Supreme Court defined a unitary school system as one "within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes County Bd. of Ed.*, 396 U. S. 19, 20 (1969). This definition, as the Chief Justice noted in *Northercross v. Board of Ed. of Memphis*, 90 S.Ct. 891, 89

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(1970), leaves open practical problems, "including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."

Several of these issues arise in this case. To resolve them, we hold: first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. Special classes, functions, and programs on an integrated basis should be made available to pupils in the black schools. The board should freely allow majority to minority transfers and provide transportation by bus or common carrier so individual students can leave the black schools. And pupils who are assigned to black schools for a portion of their school careers should be assigned to integrated schools as they progress from one school to another.

We adopted the test of reasonableness—instead of one that calls for absolutes—because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integra-

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tion of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruction of Orange County*, No. 29124, Feb. 17, 1970 — F.2d — (5th Cir.)

III.

The school board's plan proposes that pupils will be assigned to the system's ten high schools according to geographic zones. A typical zone is generally fan shaped and extends from the center of the city to the suburban and rural areas of the county. In this manner the board was able to integrate nine of the high schools with a percentage of black students ranging from 17% to 36%. The projected black attendance at the tenth school, Independence, which has a maximum of 1400 pupils, is 2%.

The court approved the board's high school plan with one modification. It required that an additional 300 pupils should be transported from the black residential area of the city to Independence School.

The school board proposed to rezone the 21 junior high school areas so that black attendance would range from 0% to 90% with only one school in excess of 38%. This school, Piedmont, in the heart of the black residential area, has an enrollment of 840 pupils, 90% of whom are black. The district court disapproved the board's plan because it maintained Piedmont as a predominantly black school. The court gave the board four options to desegregate all the junior high schools: (1) rezoning; (2) two-way transportation of pupils between Piedmont and white schools; (3) closing Piedmont and reassigning its pupils and (4)

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adopting a plan proposed by Dr. John A. Finger, Jr., a consultant appointed by the court, which combined zoning with satellite districts. The board, expressing a preference for its own plan, reluctantly adopted the plan proposed by the court's consultant.

Approximately 31,000 white and 13,000 black pupils are enrolled in 76 elementary schools. The board's plan for desegregating these schools is based entirely upon geographic zoning. Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white. In place of the board's plan, the court approved a plan based on zoning, pairing, and grouping, devised by Dr. Finger, that resulted in student bodies that ranged from 9% to 38% black.

The court estimated that the overall plan which it approved would require this additional transportation:

	No. of pupils	No. of buses	Operating costs
Senior High	1,500	20	\$ 30,000
Junior High	2,500	28	\$ 50,000
Elementary	9,300	90	\$186,000
TOTAL	13,300	138	\$266,000

In addition, the court found that a new bus cost about \$5,400, making a total outlay for equipment of \$745,200. The total expenditure for the first year would be about \$1,011,200.

The school board computed the additional transportation requirements under the court approved plan to be:

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	No. of pupils	No. of buses	Operating costs
Senior High	2,497	69	\$ 96,000
Junior High	4,359	84	\$116,800
Elementary	12,429	269	\$374,000
TOTAL	19,285	422	\$586,000

In addition to the annual operating cost, the school board projected the following expenditures:

Cost of buses	\$2,369,100
Cost of parking areas	284,800
Cost of additional personnel	166,200

Based on these figures, the school board computed the total expenditures for the first year would be \$3,406,700 under the court approved plan.⁴

⁴ The school board computed transportation requirements under the plan it submitted to be:

	No. of pupils	No. of buses	Operating cost
Senior High	1,202	30	\$ 41,700
Junior High	1,388	33	\$ 45,900
Elementary	2,345	41	\$ 57,000
TOTAL	4,935	104	\$144,600

The board estimated that the breakdown of costs for the first year of operation under its plan would be:

Cost of buses	\$589,900
Cost of parking areas	56,200
Operating expenses of	\$144,600
Plus depreciation allowance of	31,000
	<hr/>
Cost of additional personnel	175,600
	43,000

The estimated total first-year costs are \$864,700.

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Both the findings of the district court and the evidence submitted by the board are based on estimates that rest on many variables. Past practice has shown that a large percentage of students eligible for bus transportation prefer to provide their own transportation. However, it is difficult to accurately predict how many eligible students will accept transportation on the new routes and schedules. The number of students that a bus can carry each day depends in part on the number of trips the bus can make. Scheduling two trips for a bus generally reduces costs. But student drivers may not be able to spend the time required for two trips, so that adult drivers will have to be hired at substantially higher salaries. It is difficult to accurately forecast how traffic delays will affect the time needed for each trip, for large numbers of school buses themselves generate traffic problems that only experience can measure.

The board based its projections on each 54-passenger bus carrying about 40 high school pupils or 54 junior high and elementary pupils for one roundtrip a day. Using this formula, it arrived at a need of 422 additional buses for transporting 19,285 additional pupils. This appears to be a less efficient operation than the present system which transports 23,600 pupils with 280 buses, but the board's witnesses suggest that prospects of heavier traffic justify the difference. The board also envisioned parking that seems to be more elaborate than that currently used at some schools.

In making its findings, the district court applied factors derived from present bus operation, such as the annual operating cost per student, the average number of trips each bus makes, the capacity of the buses—including permissible overloads, and the percentage of eligible pupils who use other forms of transportation. The district court also found no need for expensive parking facilities or for

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additional personnel whose costs could not be absorbed by the amount allocated for operating expenses. While we recognize that no estimate—whether submitted by the board or made by the court—can be absolutely correct, we accept as not clearly erroneous the findings of the district court.

Opposition to the assignment of pupils under both the board's plan and the plan the court approved centered on bussing, which numbers among its critics both black and white parents. This criticism, however, cannot justify the maintenance of a dual system of schools. *Cooper v. Aaron*, 358 U.S. 1 (1958). Bussing is neither new nor unusual. It has been used for years to transport pupils to consolidated schools in both racially dual and unitary school systems. Figures compiled by the National Education Association show that nationally the number of pupils bussed increased from 12 million in the 1958-59 school year to 17 million a decade later. In North Carolina 54.9% of all pupils are bussed. There the average daily roundtrip is 24 miles, and the annual cost is over \$14,000,000. The Charlotte-Mecklenburg School District presently busses about 23,600 pupils and another 5,000 ride common carriers.

Bussing is a permissible tool for achieving integration, but it is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources. The board should view bussing for integration in the light that it views bussing for other legitimate improvements, such as school consolidation and the location of new schools. In short, the board should draw on its experience with bussing in general—the benefits and the defects—so that it may intelligently plan the part that bussing will play in a unitary school system.

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Viewing the plan the district court approved for junior and senior high schools against these principles and the background of national, state, and local transportation policies, we conclude that it provides a reasonable way of eliminating all segregation in these schools. The estimated increase in the number of junior and senior high school students who must be bussed is about 17% of all pupils now being bussed. The additional pupils are in the upper grades and for the most part they will be going to schools already served by busses from other sections of the district. Moreover, the routes they must travel do not vary appreciably in length from the average route of the system's buses. The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools.⁵

We find no merit in other criticism of the plan for junior and senior high schools. The use of satellite school zones⁶

⁵ These 300 students will be bussed a straight-line distance of some 10 miles. The actual bus routes will be somewhat longer, depending upon the route chosen. A reasonable estimate of the bus route distance is 12 to 13 miles. The principal's monthly bus reports for Independence High School for the month from January 10, 1970 to February 10, 1970 shows the average one-way length of a bus route at Independence is presently 16.7 miles for the first trip. Buses that make two trips usually have a shorter second trip. The average one-way bus route, including both first and second trips, is 11.7 miles. Thus the distance the 300 pupils will have to be bussed is nearly the same as the average one-way bus route of the students presently attending Independence, and it is substantially shorter than the system's average one-way bus trip of 17 miles.

⁶ Satellite school zones are non-contiguous geographical zones. Typically, areas in the black core of the city are coupled—but not geographically linked—with an area in white suburbia.

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as a means of achieving desegregation is not improper. District Courts have been directed to shape remedies that are characterized by the "practical flexibility" that is a hallmark of equity. See *Brown v. Board of Ed.*, 349 U.S. 294, 300 (1955). Similarly, the pairing and clustering of schools has been approved. *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 442 n. 6 (1968); *Hall v. St. Helena Parish School Bd.*, 417 F.2d 801, 809 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969).

The school board also asserts that §§ 401(b) and 407(a) (2) of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000c(b) and -6(a)(2)] forbid the bussing ordered by the district court.⁷ But this argument misreads the legislative history of the statute. Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome *de facto* segregation. See generally, *United States v. School District 151*, 404

⁷ Title 42 U.S.C. § 2000c(b) provides that as used in the subchapter on Public Education of the Civil Rights Act of 1964:

" 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Title 42 § 2000c-6(a)(2) states in part:

"[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

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F.2d 1125, 1130 (7th Cir. 1968); *United States v. Jefferson County Board of Ed.*, 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing en banc* 380 F.2d 385 (5th Cir.), *cert. denied, sub nom. Caddo Parish School Bd. v. United States*, 389 U.S. 840 (1967); *Keyes v. School Dist. No. One, Denver*, 303 F.Supp. 289, 298 (D. Colo.), *stay pending appeal granted*, — F.2d — (10th Cir.); *stay vacated*, 396 U.S. 1215 (1969). Nor does North Carolina's anti-bussing law present an obstacle to the plan, for those provisions of the statute in conflict with the plan have been declared unconstitutional. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, — F. Supp. — (W.D.N.C. 1970).⁸

The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated. Part of the difficulty concerning the elementary schools results from the board's refusal to accept the district court's suggestion that it control experts from the Department of Health, Education, and Welfare. The consultants that the board employed were undoubtedly competent, but the board limited their choice of remedies by maintaining each school's grade structure. This, in effect, restricted the means of overcoming segregation to only geographical zoning, and as a further restriction the board insisted on contiguous zones. The board rejected such legitimate techniques as

⁸ The unconstitutional provisions are:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing." N.C. Gen. Stat. § 115-176.1 (Supp. 1969).

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pairing, grouping, clustering, and satellite zoning. Moreover, the board sought to impose a ratio in each school of not less than 60% white students. While a 60%-40% ratio of white to black pupils might be desirable under some circumstances, rigid adherence to this formula in every school should not be allowed to defeat integration.

On the other hand, the Finger plan, which the district court approved, will require transporting 9,300 pupils in 90 additional buses. The greatest portion of the proposed transportation involves cross-bussing to paired schools—that is, black pupils in grades one through four would be carried to predominantly white schools, and white pupils in the fifth and sixth grades would be transported to the black schools. The average daily roundtrip approximates 15 miles through central city and suburban traffic.

The additional elementary pupils who must be bussed represent an increase of 39% over all pupils presently being bussed, and their transportation will require an increase of about 32% in the present fleet of buses. When the additional bussing for elementary pupils is coupled with the additional requirements for junior and senior high schools, which we have approved, the total percentages of increase are: pupils, 56%, and buses, 49%. The board, we believe, should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system.

IV.

Both parties oppose a remand. Each side is adamant that its position is correct—the school board seeks total approval of its plan and the plaintiffs insist on implementation of the Finger plan. We are favorably impressed, however, by the suggestion of the United States, which at

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our invitation filed a brief as amicus curiae, that the school board should consider alternative plans, particularly for the elementary schools. We, therefore, will vacate the judgment of the district court and remand the case for reconsideration of the assignment of pupils in the elementary schools, and for adjustments, if any, that this may require in plans for the junior and senior high schools.

On remand, we suggest that the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare, and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation. Undoubtedly some transportation will be necessary to supplement these techniques. Indeed, the school board's plan proposed transporting 2,300 elementary pupils, and our remand should not be interpreted to prohibit all bussing. Furthermore, in devising a new plan, the board should not perpetuate segregation by rigid adherence to the 60% white-40% black racial ratio it favors.

If, despite all reasonable efforts to integrate every school, some remain segregated because of residential patterns, the school board must take further steps along the lines we previously mentioned, including a majority to minority transfer plan,⁹ to assure that no pupil is excluded from an integrated school on the basis of race.

⁹ The board's plan provides:

"Any black student will be permitted to transfer only if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted to transfer only if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to

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Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969), and *Carter v. West Feliciana School Bd.*, 396 U.S. 290 (1970), emphasize that school boards must forthwith convert from dual to unitary systems. In *Nesbit v. Statesville City Bd. of Ed.*, 418 F.2d 1040 (4th Cir. 1969), and *Whittenberg v. School Dist. of Greenville County*, — F.2d — (4th Cir. 1970), we reiterated that immediate reform is imperative. We adhere to these principles, and district courts in this circuit should not consider the stays which were allowed because of the exceptional nature of this case to be precedent for departing from the directions stated in *Alexander*, *Carter*, *Nesbit*, and *Whittenberg*.

Prompt action is also essential for the solution of the remaining difficulties in this case. The school board should immediately consult with experts from HEW and file its new plan by June 30, 1970. The plaintiffs should file their exceptions, if any, within 7 days, and the district court should promptly conduct all necessary hearings so that the plan may take effect with the opening of school next fall. Since time is pressing, the district court's order approving a new plan shall remain in full force and effect unless it is modified by an order of this court. After a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the

attend has less than 70 per cent of his race and has available space."

This clause, which was designed to prevent tipping or resegregation, would be suitable if all schools in the system were integrated. But since the board envisions some elementary schools will remain nearly all black, it unduly restricts the schools to which pupils in these schools can transfer. It should be amended to allow these elementary pupils to transfer to any school in which their race is a minority if space is available.

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district court considers the suggested modifications. Cf. *Nesbit v. Statesville City Bd. of Ed.*, 418 F.2d 1040, 1043 (4th Cir. 1969).

Finally, we approve the district court's inclusion of Dr. Finger's consultant fee in the costs taxed against the board. See *In the Matter of Peterson*, 253 U.S. 300, 312 (1920). We caution, however, that when a court needs an expert, it should avoid appointing a person who has appeared as a witness for one of the parties. But the evidence discloses that Dr. Finger was well qualified, and his dual role did not cause him to be faithless to the trust the court imposed on him. Therefore, the error, if any, in his selection, was harmless.

We find no merit in the other objections raised by the appellants or in the appellees' motion to dismiss the appeal. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring in part and dissenting in part:

Insofar as the court today affirms the District Court's order in respect to the senior and junior high schools, I concur. I dissent from the failure to affirm the portion of the order pertaining to the elementary schools.

I

THE BASIC LAW AND THE PARTICULAR FACTS

All uncertainty about the constitutional mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), was put to rest when in *Green v. County School Board of New Kent County* the Supreme Court spelled out a school board's "affirmative duty to take

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whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated "root and branch," 391 U.S. 430, 437-438 (1968). "Disestablish[ment of] state-imposed segregation" (at 439) entailed "steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools" (at 442). If there could still be doubts they were answered this past year. In *Alexander v. Holmes County Board of Education*, the Court held that "[u]nder explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools," 396 U.S. 19, 20 (1969). The command was once more reaffirmed in *Carter v. West Feliciana School Board*, 398 U.S. 290 (1970), requiring "relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system." (Harlan, J., concurring at 292).

We face in this case a school district divided along racial lines. This is not a fortuity. It is the result, as the majority has recognized, of government fostered residential patterns, school planning, placement, and, as the District Court found, gerrymandering. These factors have interacted on each other so that by this date the black and white populations, in school and at home, are virtually entirely separate.

As of November 7, 1969, out of 106 schools in the system 57 were racially identifiable as white, 25 were racially identifiable as black.¹ Of these, nine were all white schools and eleven all black. Of 24,714 black students in the system 16,000 were in entirely or predominantly black schools.

¹ In the entire system, 71% of the pupils are white, 29% of the pupils are black. The District Judge deemed a school having 86% or greater white population identifiable as white, one with 56% or greater black population identifiable as black.

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There are 76 elementary schools with over 44,000 pupils. In November 1969, 43 were identifiable as white, 16 as black, with 13 of the latter 98% or more black, and none less than 65%. For the future the Board proposes little improvement. There would still be 25 identifiably white elementary schools and approximately half of the white elementary students would attend schools 86 to 100% white. Nine schools would remain 83 to 100% black, serving 6,432 students or over half the black elementary pupils.

To call either the past or the proposed distribution a "unitary system" would be to embrace an illusion.² And the majority does not contend that the system is unitary, for it holds that "the district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated." The Board's duty then is plain and unarguable: to convert to a unitary system. The duty is absolute. It is not to be tempered or watered down. It must be done, and done now.

² In its application to us for a stay pending appeal, counsel for the School Board relied heavily on *Northercross v. Board of Education of Memphis*, — — F.2d — — (6th Cir. 1970), as a judicial ruling that school assignments based on residence are constitutionally immune. The defendant tendered us a statistical comparison of pupil enrollment by school with pupil population by attendance area for the Memphis school system.

Since then the Supreme Court in *Northercross* has ruled that the Court of Appeals erred insofar as it held that the Memphis board "is not now operating a 'dual school system' * * * ." 38 L.W. 4219.

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II

THE COURT-ORDERED PLAN

A. *The Necessity of the Court-Ordered Plan*

The plan ordered by the District Court works. It does the job of desegregating the schools completely. This "places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439.

The most significant fact about the District Court's plan is that it—or one like it—is the only one that can work. Obviously, when the black students are all on one side of town, the whites on the other, only transportation will bring them together. The District Judge is quite explicit:

Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (and continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

The point has been perceived by the counsel for the Board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it.

The only suggestion that there is a possible alternative middle course came from the United States, participating as *amicus curiae*. Its brief was prefaced by the following revealing confession:

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We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

Nowwithstanding this disclaimer, the Government went on to imply in oral argument—and has apparently impressed on this court—that HEW could do better. No concrete solution is suggested but the Government does advert to the possibility of pairing and grouping of schools. Two points stand out. First, pairing and grouping are precisely what the Finger plan, adopted by the District Court, does. Second, in the circumstances of this case, these methods necessarily entail bussing.

I am not "favorably impressed" by the Government's performance. Its vague and noncommittal representations do little but obscure the real issues, introduce uncertainty and fail to meet the "heavy burden" necessary to overturn the District Court's effective plan.³

³ A federal judge is not required to consult with the Department of Health, Education and Welfare on legal issues. What is the constitutional objective of a plan, and whether a unitary system has been or will be achieved, are questions for the court. HEW's interpretation of the constitutional command does not bind the courts.

[W]hile administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards

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B. The Feasibility of the Plan

Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished. There is no genuine dispute on this point. The plan is simple and quite efficient. A bus will make one pickup in the vicinity of the children's residences, say in the white residential area. It then will make an express trip to the inner-city school. Because of the non-stop feature, time can be considerably shortened and a bus could make a return trip to pick up black students in the inner city and to convey them to the outlying school. There is no evidence of insurmountable traffic problems due to the increased

controlling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board of Charles City County, 382 F.2d 326 (1967).

Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it was quite understandable that at the outset of this case the District Court invited the Board to consult with HEW. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help. However, after a substantial period of time and the beginning of a new school year, it became clear that the Board had no intention of devising a meaningful plan, much less seeking advice on how to do so. At that point (December 1969) with the need for speed in mind, the Judge appointed an expert already familiar with the school system to work with the school staff in developing a plan.

Whether to utilize the assistance of HEW is ordinarily up to the district judge. Consultation in formulating the mechanics of a plan is not obligatory. The method used by the Judge in this case was certainly sufficient. Moreover, now that a plan has been created and it appears that there are no real alternatives, a remand for HEW's advice seems an exercise in futility.

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bussing.⁴ Indeed, straight line bussing promises to be quicker. The present average one-way trip is over 15 miles and takes one hour and fourteen minutes; under the plan the average one-way trip for elementary students will be less than seven miles and 35 minutes. The cost of all of the additional bussing will be less than one week's operating budget.⁵

C. The Standard of Review

In *Brown II*, the Supreme Court charged the district courts with the enforcement of the dictates of *Brown I*.

⁴The only indication I have encountered that a serious traffic problem will be occasioned by the additional bussing is found in an affidavit by the City Director of Traffic Engineering. His statement is based on the exaggerated bus estimate prepared by the Board and rejected by the District Court. See note 5, *infra*. Moreover, he appears to have relied to a large extent on the erroneous assumption that under the plan busses would pick up and discharge passengers along busy thoroughfares, thus causing "stop-and-go" traffic of slow moving school busses in congested traffic."

A later affidavit of the same official, filed at the request of the District Court, affords more substantial data. It reveals that the total estimated number of automobile trips per day in Charlotte and Mecklenburg County (not including internal truck trips) is 869,604. That the 138 additional busses would gravely aggravate the congestion is dubious, to say the least.

⁵The District Judge rejected the Board's inflated claims, and found that altogether the Finger plan would bus 13,300 new students in 138 additional busses. The Board had estimated that 19,285 additional pupils would have to be transported, requiring 422 additional busses. This estimate is disproportionate on its face, for presently 23,600 pupils are transported in 280 busses. As indicated above, the direct bus routes envisioned by the Finger plan should accomplish increased, not diminished, efficiency. The court below, after close analysis, discounted the Board's estimate for other reasons as well, including the "very short measurements" used by the Board in determining who would have to be bussed, the failure of the Board to account for round-trips, staggering of opening and closing hours, and overloads.

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The lower courts were to have "a practical flexibility in shaping * * * remedies." 349 U.S. at 300. Thus, in subsuming these cases under traditional equity principles, the Supreme Court brought the desegregation decree within the rule that to be overturned it "must [be] demonstrate[d] that there was no reasonable basis for the District Judge's decision." *United States v. W. T. Grant Co.*, 345 U.S. 629, 634 (1953). This court has paid homage to this maxim of appellate review when, in the past, a district Judge has ordered less than comprehensive relief. *Bradley v. School Board of the City of Richmond*, 345 F.2d 310, 320 (1965), *rev'd*, 382 U.S. 103 (1965). What is called for here is similar deference to an order that would finally inter the dual system and not preserve a nettlesome residue. As the Supreme Court made clear in *Green*, *supra*, those who would challenge an effective course of action bear a "heavy burden." The Finger plan is a remarkably economical scheme when viewed in the light of what it accomplishes. There has been no showing that it can be improved or replaced by better or more palatable means. It should, then, be sustained.

III

OBJECTIONS RAISED AGAINST THE COURT-ORDERED PLAN

A. *The "Illegal" Objective of the Plan*

My Brother Bryan expresses concern about the plan, regardless of cost, because it undertakes, in his view, an illegal objective: "achieving racial balance." Whatever might be said for this view abstractly or in another context, it is not pertinent here. We are confronted in this case with no question of bussing for mere balance unrelated to

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a mandatory constitutional goal. What the District Court has ordered is compliance with the constitutional imperative to disestablish the existing segregation. Unless we are to alter with words, desegregation necessarily entails integration, that is to say integration in some substantial degree. The dictum to the contrary in *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), was rejected by necessary implication by the Supreme Court in *Green, supra*, and explicitly by this court in *Walker v. County School Board of Brunswick Co.*, 413 F.2d 53, 54 n.2 (4th Cir. 1969).

As my Brother Winter shows, there is no more suitable way of achieving this task than by setting, at least initially, a ratio roughly approximating that of the racial population in the school system. The District Judge adopted this *ad hoc* measurement as a starting guide, expressed a willingness to accept a degree of modification,⁶ and departed from it where the circumstances required.

B. The "Unreasonableness" of the Plan

The majority does not quarrel with the plan's objective, nor, accepting the findings of the District Court, does it really dispute that the plan can be achieved. Rather, we are told, the plan is an unreasonable burden.

⁶ The District Judge wrote in his December 1 order that

Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

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This notion must be emphatically rejected. At bottom it is no more than an abstract, unexplicated judgment—a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional right does not rest in the school board's discretion, as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis. It is not for the Board or this court to say that the cost of compliance with *Brown* is "unreasonable."

That a subjective assessment is the operational part of the new "reasonableness" doctrine is highlighted by a study of the factors the majority bids school boards take into account in making bussing determinations. "[A] school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." But, as we have seen, distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal. As far as age is concerned, it has never prevented the bussing of pupils in Charlotte-Mecklenburg, or in North Carolina generally, where 70.9% of all bussed students are elementary pupils.

If the transportation of elementary pupils were a novelty sought to be introduced by the District Court, I could understand my brethren's reluctance. But, as is conceded,

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bussing of children of elementary school age is an established tradition. Bussing has long been used to perpetuate dual systems.⁷ More importantly, bussing is a recognized educational tool in Charlotte-Mecklenburg and North Carolina. And as the National Education Association has admirably demonstrated in its brief, bussing has played a crucial role in the evolution from the one-room schoolhouse in this nation. Since the majority accepts the legitimacy of bussing, today's decision totally baffles me.

In the final analysis, the elementary pupil phase of the Finger plan is disapproved because the percentage increase in bussing is somehow determined to be too onerous.⁸ Why this is so we are not told. The Board plan itself would bus 5,000 additional pupils. The fact remains that in North Carolina 55% of all pupils are now being bussed. Under the Finger plan approximately 47% of the Charlotte-Mecklenburg student population would be bussed. This is well within the existing percentage throughout the state.

The majority's proposal is inherently ambiguous. The

⁷ For some extreme examples, see: *School Board of Warren County v. Kelly*, 259 F.2d 497 (4th Cir. 1958); *Corbin v. County School Bd. of Pulaski County*, 117 F.2d 924 (4th Cir. 1949); *Griffith v. Bd. of Educ. of Yancey County*, 186 F. Supp. 511 (W.D.N.C. 1960); *Gains v. County School Bd. of Grayson County*, 186 F. Supp. 753 (W.D.a. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960). See also, *Chambers v. Iredell Co.*, — F.2d — (4th Cir. 1970) (dissenting opinion).

⁸ The majority calculates the elementary school portion of the plan to mean a 39% increase in bussed pupils, 32% increase in busses; the whole package, it is said, would require a 56% pupil increase and 49% bus increase.

These figures are accurate but do not tell the whole story. If one includes within the number of students presently being transported those that are bussed on commercial lines (5000), the increase in pupils transported would not appear to be as large. Thus the plan for elementary schools would entail a 33% bussed pupil increment, the whole Finger plan, 47%.

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court-ordered plan is said to be unreasonable. Yet the School Board's own plan has also been disapproved. Does the decision—that the Finger plan is unreasonable—depend on the premise that an intermediate course is available? Would the amount of segregation retained in the School Board's plan be avowedly sanctioned if it were recognized that nothing short of the steps delineated in the District Court's plan will suffice to eliminate it? Since there is no practicable alternative, must we assume that the majority is willing to tolerate the deficiencies in the Board plan?

These questions remain unresolved and thus the ultimate meaning of the "reasonableness" doctrine is undefined. Suffice it to say that this case is not an appropriate one in which to grapple with the theoretical issue whether the law can endure a slight but irreducible remnant of segregated schools. This record presents no such problem. The remnant of racially identifiable elementary schools, to which the District Court addressed itself, encompasses over half the elementary population. This large fraction cannot be called slight; nor, as the Finger plan demonstrates, is it irreducible.

I am even more convinced of the unwisdom of reaching out to fashion a new "rule of reason," when this record is far from requiring it, because of the serious consequences it would portend for the general course of school desegregation. Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and

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deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Moreover, the opinion catapults us back to the time, thought passed, when it was the fashion to contend that the inquiry was not how much progress had been made but the presence or absence of good faith on the part of the board. Whether an "intractable remnant of segregation" can be allowed to persist, apparently will now depend in large measure on a slippery test: an estimate of whether the Board has made "every reasonable effort to integrate the pupils under its control."

¹ Both in its characterization of the facts and in its treatment of the case the majority implies that the actions of this Board have been exemplary. I feel constrained to register my dissent from this view although on no account do I subscribe to the proposition that the disposition of the case depends on this issue.

On April 23, 1969 the District Judge declared the Charlotte-Mecklenburg School District illegally segregated. He found it unnecessary at that time to decide whether the Board had deliberately gerrymandered to perpetuate the dual system since he believed that the court order to follow would promote substantial changes. The Board was given until May 15 to devise a plan eliminating faculty and student segregation.

A majority of the Board voted not to take an immediate appeal and the school superintendent was directed to prepare a plan. His mandate was hazy. According to the court below—

No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal.

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The staff were never directed to do any serious work on re-drawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other

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The Supreme Court having barred further delay by its insistent emphasis on an immediate remedy, we should not lend ourselves to the creation of a new loophole by attenuating the substance of desegregation.

possible methods of making real progress towards desegregation.

The superintendent's plan was submitted to the Board on May 19. It was quite modest in its undertaking. Nevertheless, the Board "struck out virtually all the effective provisions of the superintendent's plan." The plan ultimately filed by the Board on May 28 was "the plan previously found racially discriminatory with the addition of one element—the provision of transportation for [majority to minority transfers.]" The Board also added a rule making a student who transfers to a new high school ineligible for athletics for a year. As the District Judge found,

[t]he effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who have no desire for such transfers.

In the meantime the Board for the first time refused to accept a recommendation of the superintendent for the promotion of a teacher to principal. The reason avowed was that the teacher who was black and a plaintiff in the suit, had publicly expressed his agreement with the District Court order. The job was withheld until the prospective appointee signed a "loyalty oath."

The District Judge held a hearing on June 16 and ruled on June 20. He declined to find the Board in contempt but did not say that "[t]he board does not admit nor claim that it has a positive duty to promote desegregation." The Judge also returned to the issue of gerrymandering and found "a long standing policy of control over the makeup of school population which scarcely fits any true 'neighborhood school philosophy.'"

On July 29, the Board returned with a new plan. The District Judge was pleased to learn that "the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.'" In view of this declaration and of the late date, the court "reluctantly" approved for one year only a plan whereby seven all black inner-city schools would be closed and a total of 4245 black children bussed to outlying white schools.

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Albert V. Bryan, Circuit Judge, dissenting in part:

The Court commands the Charlotte-Mecklenburg Board of Education to provide bussing of pupils to its public schools for "achieving integration". (Accent added.) "[A]chieving integration" is the phraseology used, but actually, achieving racial balance is the objective. Bussing

The Board was directed to file a plan for complete desegregation in November.

By November, the District Judge was able to survey the results achieved under the plan adopted for the year. He found that "only 1315 instead of the promised 4245 black pupils" had been transferred. (Later information revealed that the number was only 767.) Furthermore, he found that

The Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they intend not to do it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

On November 17, the Board filed a plan. It "discarded further consideration of pairing, grouping, clustering and transporting." Ostensibly "to avoid 'tipping,'" the plan provided that white students would not be assigned schools where they would find themselves with less than 60% whites. This was, as the District Court found, a one-way street in view of the fact that the plan contemplated no effort to desegregate schools with greater than 40% blacks. The plan also dropped the earlier provision of transportation for students transferring out of segregated situations. Thus the Board nullified the one improvement it had made in its May 8 plan. It also left those black students who had transferred to outlying schools pursuant to the July 29 plan without transportation. Understandably, the court labeled this "re-segregation."

In the face of this total lack of cooperation on the part of the Board, the court was compelled to appoint an expert to devise a plan for desegregation. The Finger plan was the result.

It appears from the record that on most issues the Board was sharply divided. Of course I mean to cast no aspersions on those members—and there were some—who urged the Board forthrightly to shoulder its duty. But the above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making "every reasonable effort" to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn.

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to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of bussing for this or other reasons, and regardless of cost considerations or duplication of the bus routes, I think the injunction cannot stand.

Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of *Brown v. Board of Education*, 347 US 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.

The majority opinion presupposes this racial balance, and also bussing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the schools; . . . [and] to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." See his memorandum appended to *Northercross v. Board of Education of the Memphis, Tennessee, City Schools*, — US —, 38 USLW 4219, 4220 (March 9, 1970).*

Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code § 2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal court] seeking to achieve a racial balance in any

* On remand the District Court in *Northercross* has held there was no Constitutional obligation to transport pupils to overcome a racial imbalance. *Northercross v. Board of Education of the Memphis City Schools*, — FS — (W.D.Tenn., May 1, 1970) (per McRae, J.). In the same Circuit, see, too, *Deal v. Cincinnati Board of Education*, 419 F2d 1387 (6 Cir. 1969).

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school by requiring the transportation of pupils or students from one school to another . . . to achieve such racial balance"

I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase.

WINTER, Circuit Judge, concurring in part and dissenting in part:

I would affirm the order of the district court in its entirety.*

In a school district in which freedom of choice has patently failed to overcome past state policy of segregation and to achieve a unitary system, the district court found the reasons for failure. They included resort to a desegregation plan based on geographical zoning with a free transfer provision, rather than a more positive method of achieving the constitutional objective, the failure to integrate faculties, the existence of segregated racial patterns partially as a result of federal, state and local governmental action and the use of a neighborhood concept for the location of schools superimposed upon a segregated residential pattern. Correctly the majority accepts these findings under established principles of appellate review. To illustrate how government-encouraged residential segregation, coupled with the discriminatory location and design of schools, resulted in a dual system, the majority demonstrates that in this locality busing has been employed as a tool to perpetuate segregated schools.

* Certainly, if the district court's order with respect to high schools and junior high schools is affirmed, the district court should not be invited to reconsider its order with respect to them. The jurisdiction of the district court is continuing and it may always modify its previous orders with respect to any school upon application and for good cause shown.

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In complete compliance with *Carter v. West Feliciana School Board*, — U. S. — (1970); *Alexander v. Holmes County Bd. of Ed.*, — U. S. — (1969); *Green v. School Bd. of New Kent County*, 391 U. S. 430 (1968), and *Mouroe v. Bd. of Comm'rs.*, 391 U. S. 450 (1968), the majority concludes that the existing high school and junior high school system must be dismantled and that the constitutional mandate can be met by the use of geographical assignment, including satellite districts and busing.

The majority thus holds that the Constitution requires that this dual system be dismantled. It indicates its recognition of the need to overcome the discriminatory educational effect of such factors as residential segregation. It also approves the use of zones, satellite districts and resultant busing for the achievement of a unitary system at the high school and junior high school levels. Nevertheless, the majority disapproves a similar plan for the desegregation of the elementary schools on the ground that the busing involved is too onerous. I believe that this ground is insubstantial and untenable.

At the outset, it is well to remember the seminal declaration in *Brown v. Board of Education (Brown II)*, 349 U. S. 294, 300 (1955), that in cases of this nature trial courts are to "be guided by equitable principles" in "fashioning and effectuating decrees." Since *Brown II* the course of decision has not departed from the underlying premise that this is an equitable proceeding, and that the district court is invested with broad discretion to frame a remedy for the wrongful acts which the majority agrees have been committed. In *Green v. School Board of New Kent County*, 391 U. S. at 438, the Supreme Court held that the district courts not only have the "power" but the "duty to render a decree which will, so far as possible, eliminate the dis-

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criminatory effects of the past, as well as bar like discrimination in the future." District courts were directed to "retain jurisdiction until it is clear that disestablishment has been achieved." *Raney v. Board of Education*, 391 U. S. 443, 449 (1968). Where it is necessary district courts may even require local authorities "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Griffin v. School Board*, 377 U. S. 218, 233 (1964). Thus, the Supreme Court has made it abundantly clear that the district courts have the power, and the duty as well, to fashion equitable remedies designed to extirpate racial segregation in the public schools. And in fashioning equitable relief, the decree of a district court must be sustained unless it constitutes a clear abuse of discretion. *United States v. W. T. Grant Co.*, 345 U. S. 619 (1953).

Busing is among the panoply of devices which a court of equity may employ in fashioning an equitable remedy in a case of this type. The district court's order required that "transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about reduction of segregation, and who lives farther from the school to which they are assigned than the Board determines to be walking distance." It found as a fact, and I accept its finding, that "there is no way" to desegregate the Charlotte schools in the heart of the black community without providing such transportation.

The district court's order is neither a substantial advance nor extension of present policy, nor on this record does it constitute an abuse of discretion. This school system, like many others, is now actively engaged in the business of transporting students to school. Indeed, busing is a widespread practice in the United States. U. S. Commission on

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Civil Rights, *Racial Isolation in the Public Schools* 180 (1967). Between 1954 and 1967 the number of pupils using school transportation has increased from 9,509,699 to 17,271,718. National Education Association, National Commission on Safety Education, *1967-68 Statistics on Pupil Transportation* 3.

Given its widespread adoption in American education, it is not surprising that busing has been held an acceptable tool for dismantling a dual school system. In *United States v. Jefferson County Board of Education*, 380 F.2d 385, 392 (5 Cir.) (en banc), cert. den. sub. nom. *Caddo Parrish School Bd. v. United States*, 389 U. S. 840 (1967), the court ordered that bus service which was "generally provided" must be routed so as to transport every student "to the school to which he is assigned" provided that the school "is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules." Similarly, in *United States v. School Dist. 151*, 286 F. S. 786, 799 (N.D. Ill. 1968), *aff'd.*, 404 F.2d 1125 (7 Cir. 1968), the court said that remedying the effects of past discrimination required giving consideration to "racial factors" in such matters as "assigning students" and providing transportation of pupils. In addition, the Eighth Circuit in *Kemp v. Beasley*, — F.2d — (8 Cir. 1970), recognized that busing is "one possible tool in the implementation of unitary schools." And, finally, *Griffin v. School Board, supra*, makes it clear that the added cost of necessary transportation does not render a plan objectionable.

I turn, then, to the extent and effect of busing of elementary school students as ordered by the district court.

Presently, 23,600 students—21% of the total school population—are bused, excluding some 5,000 pupils who travel to and from school by public transportation. The school

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board operates 280 buses. The average cost of busing students is \$39.92 per student, of which one-half is borne by the state and one-half by the board. Thus, the average annual cost to the board is about \$20.00 per student. The total annual cost to the board for busing is approximately \$500,000.00 out of a total operating budget of \$51,000,000.00. The cost of busing is thus less than 1% of the total operating budget and an even smaller percentage of the \$57,700,000.00 which this school district expends on the aggregate of operations, capital outlay and debt service and this cost also represents less than 2% of the local funds which together with state and federal money constitute the revenue available annually to the school board.

The total number of elementary school pupils presently bused does not appear, but under the district court's order an additional 9,300 elementary school pupils would be bused. The additional operating cost of busing them would not exceed \$186,000.00 per year. They would require not more than 90 additional buses, and the buses would require an additional capital outlay of \$486,000.00. The increased operating cost of the additional elementary school pupils required to be bused amounts to less than 1% of the board's school budget, and the one-time capital outlays for additional buses amounts to less than 1% of the board's total budget. The combined operational and capital cost represents less than 1.2% of the board's total budget. I am, therefore, unable to see how the majority could consider the additional cost unbearable.

Perhaps more importantly, the tender years of elementary school students requires a consideration of the impact of the district court's order on the average student. While this board transports 21% of the total school population, it is providing transportation to a far lower per-

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centage of pupils than the average North Carolina school board. In North Carolina 54.9% of the average daily attendance in the public schools was transported by bus during the 1968-69 school year.

The average distance traveled by elementary school pupils presently bused does not appear, but the district court found overall with respect to the children required to be bused by its order that they "will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported * * *." While the district court did not make separate findings with regard to the average length of travel for the additional elementary school pupils required to be bused, it did find that the average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. In contrast, the court found that under its plan the average one-way trip for elementary school students would be less than 7 miles and would require not over thirty-five minutes.

When I consider that busing has been widely used in this system to perpetuate segregation, that some busing was proposed even under the unacceptable board plans, that the cost of additional busing to the system as required by the court's order, both in absolute terms and in relation to its total expenditures is so minimal, and that the impact on the elementary school pupils is so slight, I discern no basis for concluding that the district court abused its discretion with respect to the elementary school.

Two other aspects of the majority's opinion require my comment.

First, the majority attempts to answer the query of the Chief Justice in his separate opinion in *Northcross v. Board*

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of *Ed. d. of Memphis*, — U. S. — (1970), as to whether "any particular racial balance must be achieved in the schools" by holding "that not every school in a unitary school system need be integrated * * *." To me, the holding is premature and unwise. There is not in this case either the intractable problem of a vast urban ghetto in a large city or any substantial basis on which it may be said that the cost or the impact on the system or on the pupils of dismantling the dual system is insupportable.

The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States v. Montgomery Board of Education*, 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County*, 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason

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why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

In addition to *Montgomery*, the same conclusion can be deduced from the mandate of *West Feliciana* and *Holmes County* to dismantle immediately a dual system. Schools cease to be black or white when each reflects the overall pupil racial balance of the entire system. What imbalances may be justified after a unitary system has once been established, and what departures from an overall pupil racial balance may be permitted to accommodate special circumstances in the establishment of a unitary system, should be developed on a case-by-case basis and the facts of record which each case presents.

The other aspect of the majority's opinion which troubles me greatly is its establishment of the test of reasonableness. My objections to this test do not spring from any desire to impose unreasonable, irrational or onerous solutions on school systems; I, too, seek "reasonable" means with which to achieve the constitutionally required objective of a unitary system.

My objections are two-fold.

First, this is an inappropriate case in which to establish the test. On this record it cannot be said that the board acted reasonably or that there is any viable solution to the dismantling of the dual system other than the one fashioned by the district court. Neither the board nor HEW has suggested one. So that, again, I think the majority is premature in its pronouncement and I would find no occasion to discuss reasonableness when there is no choice of remedies.

Second, the majority sets forth no standards by which to judge reasonableness or unreasonableness. The majority

Opinions of Court of Appeals dated May 26, 1970

approves the district court's plan as to high schools and junior high schools, yet disapproves as to elementary schools. The only differences are increased busing with attendant increased cost, time and distance. The majority subjectively concludes that these costs are too great to permit the enforcement of the constitutional right to a unitary system. I would find them neither prohibitive nor relatively disproportionate. But, with the absence of standards, how are the school boards or courts to know what plans are reasonable? The conscientious board cannot determine when it is in compliance. The dilatory board receives an open invitation to further litigation and delay.

Finally, I call attention to the fact that "reasonableness" has more than faint resemblance to the good faith test of *Brown II*. The 13 years between *Brown II* and *New Kent County* amply demonstrate that this test did not work. Ultimately it was required to be rejected and to have substituted for it the absolute of "now" and "at once." The majority ignores this lesson of history. If a constitutional right exists, it should be enforced. On this record the constitutional rights of elementary school pupils should be enforced in the manner prescribed by the district court, because it is clear that the district court did not abuse its discretion.

Judge Sobeloff authorizes me to say that he joins in these views.

**Judgment of Court of Appeals
dated May 26, 1970**

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from, in this case, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings.

Judge Bryan joins Haynsworth, C.J. and Boreman, J. in voting to vacate the judgment of the District Court, and to remand the case in accordance with the opinion written by Butzner, J. He does so for the sake of creating a clear majority for the decision to remand. It is his hope that upon reexamination the District Court will find it unnecessary to contravene the principle stated in Judge Bryan's dissent herein, to which he still adheres. *Screws v. United States*, 325 US 91, 135 (1945).

By direction of the Court.

SAMUEL W. PHILLIPS
Clerk

Order of Transportation Master Card
April 13, 1974

1. The United States Marine Corps (USMC)
Wentworth Institute of Technology
Cambridge, Massachusetts

April 13, 1974

Dear Mr. [Name]:

Enclosed

is

your copy of the report of the investigation of the
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]

Respectfully

Yours

Enclosed is a copy of the report of the investigation of the
[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]
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[Name] [Address] [City] [State] [Zip]
[Name] [Address] [City] [State] [Zip]

Very truly yours,

Enclosure

April 25, 1974

**Order of Three-Judge District Court
dated April 29, 1970**

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Civil No. 1974

JAMES E. SWANN, et al.,

Plaintiffs,

VERSUS

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Order of Three-Judge District Court dated April 29, 1970

Civil No. 2631

MRS. ROBERT LEE MOORE, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM
C. SELF, Superintendent of Charlotte-Mecklenburg
Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970

Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and Mc-
MILLAN, District Judge.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to de-

Order of Three-Judge District Court dated April 29, 1970

segregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.¹ This, in turn, could require up to 138 additional school buses.²

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education*, in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-*

¹ On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

² There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

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Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a

Order of Three-Judge District Court dated April 29, 1970

specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g.*, *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In

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support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except non-gerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation

Order of Three-Judge District Court dated April 29, 1970

to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)³

³ § 2000c:

As used in this subchapter—

* * * * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

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Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States v. School Dist. 151 of Cook Co.*, 404 F.2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not

Order of Three-Judge District Court dated April 29, 1970

to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); C. Wright, *Law of Federal Courts* § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, non-racial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, — U.S. —, 38 L.W. 4219 (1970); *Alexander v. Holmes*

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Co. Bd. of Ed., 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.⁴

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's perfor-

⁴ The reach of the Court's mandate is not yet clear:

[A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northercross v. Bd. of Ed. of the Memphis City Schools, — U.S. —, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. See generally Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

Order of Three-Judge District Court dated April 29, 1970

mance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown I*).

The third paragraph of the statute reads:

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis

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of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students

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in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown II*), and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown I*), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown I* and *II* an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction

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that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its systems, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, — U.S. —, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

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It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article 2 of the Constitution).

V

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.